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No. _____

In the Supreme Court of the United States

GREGORY C. PECOR,

Petitioner,

v.

JONATHAN WALLS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL R. MULCAHY
Counsel of Record

KELLY A. TAUTGES
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
222 NORTH LASALLE STREET
SUITE 2600
CHICAGO, IL 60601-1003
(312) 609-7500

Counsel for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC.,
CINCINNATI, OHIO 800-890-5001

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QUESTIONS PRESENTED

The United States Supreme Court has long held that states are prohibited from discriminating against a venire person solely based on that person's race. *See Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecutor in petitioner's trial admits that he exercised a peremptory challenge of Charles Edmonds, an African-American, at least in part, because Mr. Edmonds was a member of Operation PUSH.

The questions presented are:

1. Whether Illinois state courts' application of the "mixed-motive" test was an unreasonable application of *Batson* when the prosecutor never established, or even offered any evidence, that he would have excluded Mr. Edmonds even in the absence of his status as an African-American member of Operation PUSH.

2. Whether Illinois state courts' failure to apply the "taint" test in its analysis of the State's peremptory challenge of Mr. Edmonds was an unreasonable application of *Batson*.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Gregory C. Pecor ("Pecor" or "Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW AND JURISDICTION

The opinion of the Seventh Circuit (Pet. App. at 1a) and that of the district court (*id.* at 10a) are unpublished. The Court of Appeals issued its opinion on January 8, 2003. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 2254 provides in relevant part:

> A. An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a state court shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of

> the evidence presented in the state court proceedings.

28 U.S.C. § 2254(d)(1)(2).

STATEMENT OF THE CASE

The issue in this case is whether Illinois state courts unreasonably applied clearly established federal law when they found that the prosecutor's peremptory challenge of an African-American because of his membership in Operation PUSH was constitutionally permissible. After Pecor exhausted all of his Illinois state court appeals, he filed a petition for writ of *habeas corpus* with the United States District Court for the Northern District of Illinois. In his petition, Pecor contended that the Illinois courts were unreasonable when they determined that the prosecutor's peremptory challenges of five (5) African-American venire persons was not a *Batson* violation. Pecor also argued that he was denied effective assistance of counsel. On September 4, 2001, the District Court denied Pecor's petition for *habeas* relief.

The District Court granted Pecor's Certificate of Appealability related to his *Batson* claim for a single venire person, Chuck Edmonds, an African-American.

Pecor subsequently appealed the District Court's decision to the United States Court of Appeals for the Seventh Circuit. On appeal, Pecor argued that the Illinois state court's determination that the strike of Mr. Edmonds was not a *Batson* violation was unreasonable under 28 U.S.C. § 2254. On January 8, 2003, the Seventh Circuit affirmed the District Court's denial of *habeas* relief finding that the Illinois courts' application of the mixed motive test was reasonable. In this

Petition for Writ of Certiorari, Pecor argues that the Illinois courts' application of the mixed motive test was unreasonable. Petitioner also urges the Court to adopt the taint test to analyze racially suspect peremptory challenges.

Facts

Pecor, a white male, was convicted of various offenses by a jury in the Circuit Court of Cook County in 1988. During jury selection, the State exercised five of its first six peremptory challenges to exclude African-Americans from the jury, including Mr. Edmonds. (*Id.* at 2a.) At that time, Mr. Edmonds was a 53-year-old single male who had been employed by the Chicago Transit Authority for eight years. (*Id.* at 24) Immediately prior to his employment with the CTA, Mr. Edmonds had been a student. (*Id.*) He was a veteran of the United States Army and a member of the American Legion, the Chicago Urban League and Operation PUSH. (*Id.* at 38a.) He was also the single parent of a 16-year-old son. In his spare time, Mr. Edmonds enjoyed physical fitness activities, golf and listening to jazz. Mr. Edmonds had lived in this community for over 30 years. (*Id.* at 38a.)

After the State struck the five African-Americans, Petitioner objected, arguing that the State's use of the peremptory challenges was racially motivated and in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712 (1986). In response, the prosecutor argued:

> . . . there is no race identification with the defendant. It's a white on white crime. I do believe that *Bateson* [sic] applies . . . . we have only excused one white juror. The white juror, is the only juror that's

identifiable with the defendant. Therefore, I do not believe race is an issue here.

(*Id.* at 81a.)

The trial court overruled Petitioner's objection and held:

I have a Caucasian defendant, an alleged victim that was Caucasian and the State having exercised challenges of black individuals, and there is nothing in the world . . . that even smacks remotely that the exclusion of those individuals was for racial reasons in this case, and accordingly I find that the defense has failed to make a prima facie case under *Bateson* [sic].

(*Id.*)

Although the State exercised a peremptory challenge to exclude an African-American member of Operation PUSH from Pecor's jury, the state did not attempt to exclude a caucasian male, John Foley, who had strikingly similar characteristics to those of Mr. Edmonds. The only apparent difference between Mr. Edmonds and Mr. Foley is that Mr. Edmonds is African-American, while Mr. Foley is Caucasian. Mr. Foley was a 55-year-old married male who owned his home. (*Id.* at 99a-101a.) He had been employed as a beer truck driver for 12 years. (*Id.*) However, the trial court did not inquire into his previous employment. (*Id.*) Mr. Foley was a veteran of the United States Army and a member of the VFW and St. Maria Fathers' Club. (*Id.*) He also enjoyed physical fitness activities in his spare time. (*Id.*) Mr. Foley resided in the vicinity for almost 30 years. (*Id.*)

The trial court did not analyze or adrres the similarities of Mr. Edmonds and Mr. Foley. After the trial court overruled

Petitioner's *Batson* objection, the case proceeded to a guilty verdict.

Petitioner appealed the trial court's *Batson* ruling, and the Illinois Appellate Court reversed, holding that Petitioner did have standing to object to the State's exclusion of the African-Americans. *State v. Pecor*, 572 N.E.2d 1064 (1991). (*See Id.* at 73a–78a.) The Appellate Court remanded the case to the trial court for a *Batson* hearing.

On June 9, 1993, almost five and one-half years after the jury selection, a *Batson* hearing was conducted to inquire into the State's exclusion of Mr. Edmonds and the other African-Americans. (*Id.* at 102a.) At the hearing, the trial court found that the Petitioner established a *prima facie* case of purposeful discrimination. (*Id.* at 104a–105a.) The Court then ordered the State to provide its explanations for the exclusion of the African-Americans from the jury. (*Id.*) The trial prosecutor, Thomas Dwyer,[1] was called to provide an explanation for the exclusion of Mr. Edmonds and the other African-Americans.

However, prior to the State's providing any evidence or explanation for its exclusion of any African-Americans, the trial court found:

> Judge Dwyer, I have found that, albeit a totally innocent one on your part, but nevertheless they changed the rules on you and they changed the rules on me in this case, and I therefore find that, although I do not believe that there is a *prima facie* case

[1] At the time of the *Batson* hearing, Thomas Dwyer was a Cook County Circuit Court Judge.

> established in this case at all, in the interest of judicial economy in the event that a review court might disagree with me, I'm going to make a finding, sir, that there was an unintentional but nevertheless prima facie basis, and at this time I'm going to ask you, sir, as the lead prosecutor in that case to give the court your explanations for the exclusion of certain jurors, if you are willing to do so sir.

(*Id.* at 104a–105a.)

The prosecutor provided the following explanation for his exclusion of Mr. Edmonds:

> In the course of the voir dire, Mr. Edmonds indicated that he was a student until he was 45 years of age, that he was single, he had been — he was 53 years old, had been employed at the CTA for eight years and that he had been a member of Operation PUSH.
>
> . . . .
>
> It was the 8-year employment at age 53 years of age and the statement that he had been a student until 45 years of age, coupled with his membership in Operation PUSH. The totality of those circumstances that the State exercised its fourth peremptory challenge.

(*Id.* at 106a.)

The Petitioner argued that the State's reasons misrepresented the record and were merely a pretext for the State's purposeful discrimination. The trial court disagreed with Petitioner and found:

> beyond a shadow of a doubt that each and every one of the reasons given here today is, in fact, legitimate, is race neutral, and is not pretextual, and accordingly that no violation of *Batson* occurred in this case.

(*Id.* at 110a.)

Thereafter, Illinois' trial and appellate courts determined that the State's exclusion of Mr. Edmonds' was not a *Batson* violation.

REASON FOR GRANTING WRIT

I. The Inconsistent Application of *Batson* Within the Lower Federal and State Courts Has Created a Significant Issue for the Supreme Court to Resolve

The Supreme Court should grant *certiorari* to determine whether the mixed motives test is a reasonable application of *Batson*. The Supreme Court has yet to clarify whether the mixed motives test or the taint test is the reasonable test for trial courts to employ when analyzing racially suspect exclusions within jury selection. As a consequence, federal and state trial courts have inconsistently addressed this issue. Some courts apply the mixed motives test while others apply the taint test. This Court needs to resolve the inconsistency. Petitioner therefore respectfully requests that his petition for writ of certiorari be granted.

A. Mixed Motives Test vs. Taint Test

The mixed motives test, or sometimes known as the dual-motivation test, involves a situation where both a race-based and a race-neutral reason are offered for a peremptory strike. *Leahy v. Farmon*, 177 F. Supp. 2d 985, 999 (N.D. Cal.

2001). When a prosecutor exercises a peremptory challenge for both racial and nonracial motives, he may avoid a constitutional violation if he establishes that he would have excluded the potential juror even without the race-based motive. *See Howard v. Senkowski*, 986 F.2d 24, 26 (2nd Cir. 1993).

In contrast, the taint test provides that if any part of a prosecutor's motive for a peremptory challenge is racial, then the challenge is a constitutional violation. Under the taint test, once a discriminatory motive has been unveiled, this motive taints the "entire jury selection procedure." *Guzman v. Texas*, 85 S.W.2d 242 (Tex. Crim. App. 2002). Other race-neutral explanations offered alongside discriminatory reasons for a peremptory strike cannot cure "the element of stereotypical reasoning." *Rector v. State*, 444 S.E.2d 862 (Ga. Ct. App. 1994).

Many state courts have explicitly rejected the mixed motives test and employ the taint test in determining whether a strike is in violation of *Batson*. *See Powers v. Palacios*, 813 S.W.2d 489, 491 (Tex. 1991); *State v. Lucas*, 18 P.2d 160, 163 (Ariz. Ct. App. 2001); *Payton v. Kearse*, 495 S.E.2d 205, 210 (S.C. 1998); *Rector v. State*, 444 S.E.2d 862, 865 (Ga. Ct. App. 1994); *Ex parte Sockwell*, 675 So.2d 38, 41 (Ala. 1995). Additionally, in a denial of writ, Justice Marshall expressed his disfavor for the mixed motives test and offered support for the taint test by noting that, in order for an explanation to be neutral it "must be based wholly on nonracial criteria." *Wilkerson v. Texas*, 493 U.S. 924, 926, 110 S. Ct. 292, 294 (denying petition for writ) (Marshall, J., dissenting; joined by Brennan, J.).

The Supreme Court has not yet addressed a case involving mixed motives test vs. taint test in jury selection. *Gattis v.*

Snyder, 278 F.3d 222, 234 (3rd Cir. 2002). Given the inconsistent application in federal and state trial courts, it is essential that the Supreme Court clarify the appropriate standard to use within the context of peremptory strikes. Without a clear standard established, courts will undoubtedly continue to reach conflicting conclusions when multiple reasons are offered for a challenge, some permissible and others impermissible. *See* Geoffrey A. Gannaway, *Texas Independence: The Lone Star State Serves as an Example to Other Jurisdictions as it Rejects Mixed-Motive Defenses to Batson Challenges*, 21 REV. LITIG. 375, 391-92 (2002).

II. The Mixed Motives Test is an Unreasonable Application of Clearly Established Federal Law

The Court has an extensive tradition of prohibiting racial discrimination in the jury selection process. *Batson v. Kentucky*, 478 U.S. 79, 106 S. Ct. 1712 (1996). In *Batson*, the Court reaffirmed the idea that "racial discrimination in jury selection offends the Equal Protection Clause." *Id.* at 85. The Fourteenth Amendment protects individuals from being excluded from the jury venire on account of race, and ensures they must be "indifferently chosen." *Id.* at 86-87 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 25 L. Ed. 664 (1880)). The Constitution itself, as reinforced by the Court, prohibits all types of "purposeful racial discrimination in the selection of jurors." *Id.* at 88. The Court in *Batson* reaffirmed its commitment to remove any improper racial bias from the jury selection process, not just in those instances where the sole reason offered for the strike was discriminatory in nature.

Subsequent cases before this Court only reinforce its intolerance of racial bias within jury selection. In *Powers v. Ohio*, the Court reiterated its commitment to equal protection

principles, asserting that the Fourteenth Amendment mandates that "race discrimination be eliminated from *all* official acts and proceedings," especially in the judicial system. *Powers v. Ohio*, 499 U.S. 400, 415, 111 S. Ct. 1364, 1373 (1991) (emphasis added) (citing *Rose v. Mitchell*, 443 U.S. 545, 99 S. Ct. 2993 (1979)). *See also Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 618, 111 S. Ct. 2077, 2081 (1991) ("*Powers* relied upon over a century of jurisprudence dedicated to the elimination of race prejudice within the jury selection process"). In *Powers*, the Court extended *Batson* and found that the race of the defendant must not be considered when a court determines whether an exclusion is constitutionally permissible. *Powers*, 499 U.S. at 415. *Powers* gave Pecor, a Caucasian male, the standing to challenge the discriminatory exclusion of Mr. Edmonds, an African American male.

A. Mixed Motives Test Retards *Batson*

The mixed motives test is fundamentally incompatible with *Batson*. By allowing a race-neutral reason to "cancel-out" a race-based explanation for a strike, this test runs afoul of the goals of *Batson* and its progeny. Under *Batson*, a prosecutor must offer "a race-neutral explanation" for striking a juror. *Id.* at 98. Under the mixed motives test, an exclusion may be permissible if based on both a racial and a non-racial motive. In essence, the mixed motives test allows a prosecutor to exclude potential jurors because of their race as long as the prosecutor also has race-neutral reasons for the exclusion. Conceivably, under the mixed motives test, trial courts may find that an African-American's exclusion from a jury is constitutionally permissible where 90% of the prosecutor's motive for the exclusion was the person's race and the remaining 10% of the motive was non-racial. The Court surely did not conceive of such a scenario when it

found that "racial discrimination in jury selection offends the equal protection clause." *Batson*, 479 U.S. at 85. As Justice Marshall duly noted, in order for an explanation to be neutral, it "must be based wholly on nonracial criteria." *Wilkerson v. Texas*, 493 U.S. 924, 926, 110 S. Ct. 292 (1989) (denying petition for writ) (Marshall, J., dissenting; joined by Brennan, J.) (suggesting the inappropriateness of the mixed motives test in the *Batson* context).

The mixed motives test, in addition to being inconsistent with Supreme Court precedent, leaves *Batson* as an empty shell of protection for those whom it is intended to protect. The practice of excusing a prejudicial explanation when a neutral explanation is also offered, will serve to erode what little protection *Batson* offers. *Payton*, 495 S.E.2d at 210. Furthermore, *Batson* will become irrelevant if a prosecutor can excuse prejudice by articulating neutral, non-racial factors for his strike. Despite *Batson's* noble purpose, it cannot prevent clever lawyers from using peremptory challenges to strike potential jurors based upon impermissible rationales so long as they pretend to use other, permissible bases. Without the protection of *Batson*, "racial discrimination in jury selection, perhaps the greatest embarrassment in the administration of our criminal justice system, would go undeterred." *Wilkerson*, 493 U.S. at 928 (Marshall, J., dissenting; joined by Brennan, J.). Prosecutors will be free to eliminate jurors for unconstitutional reasons by relying on the mixed motives test to absolve them from constitutional violations. This acceptance of racial stereotypes in the field of jury selection serves only to retard our growth as a multiracial democracy. *Powers*, 813 S.W.2d at 491.

B. Taint Test Advances *Batson*

In contrast to the hollow protections of the mixed motives test, the taint test achieves the Court's goal of eradicating racial bias in jury selection. A racially motivated peremptory challenge gives rise to an inference of discriminatory purpose which vitiates the whole procedure and violates the equal protection principles of *Batson*. *Batson* prohibits strikes carried out in a racially discriminatory manner. Under a taint test, once racial bias is uncovered, the strike is *per se* unconstitutional. The taint test supports this goal by refusing to allow any improper discriminatory purpose to pervade the jury selection procedure. The Supreme Court has consistently maintained that discrimination in jury selection harms not only the individual jurors but the community as well. *J.E.B.*, 511 U.S. 127, 140, 114 S. Ct. 1419, 1427 (1994). This harm to the community results from "the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders." The taint test supports such goals by refusing to allow any race-based explanation for exercising a strike against a racial minority, even if concomitant neutral explanations are offered. By following a mixed motives, however, the Court would be considering "a party's consideration of discriminatory factors so long as sufficient nondiscriminatory factors were also part of the decision." *Payton*, 495 S.E.2d at 60. Any expression, however, of discriminatory purpose is in direct contradiction of the goals of *Batson*. *See, e.g., Gannaway*, *supra,* at 405 (once "race is explicitly mentioned even as a partial justification, the act of the litigant is no longer facially neutral...the strike explicitly relies on race, and the case should be an easy one").

III. The Preemptory Challenge of Mr. Edmonds Violates *Batson*

Under *Batson* and subsequent cases, the Supreme Court developed the following framework for evaluating claims of discrimination in the use of peremptory challenges: (1) the defendant must make a prima facie showing that the government exercised a challenge because of race; (2) the government must articulate a race-neutral reason for the challenge; and thereafter (3) the court must determine whether the defendant has carried his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 96; *Hernandez v. New York*, 500 U.S. 352, 358-59, 111 S. Ct. 1859, 1866 (1991). Here, Petitioner has satisfied all three prongs of the *Batson* analysis. The Illinois courts determined that Pecor established a *prima facie* case of purposeful discrimination. (Pet. App. 104a) The trial court then required the government to identify its reasons for excluding Mr. Edmonds. Thereafter, the trial court was required to apply well-established federal law to evaluate whether the government's reasons were race-neutral. It was at this third step of the *Batson* analysis that the Illinois courts unreasonably applied well-established law. The Illinois courts unreasonably applied the mixed motives test and found that the prosecutor did not violate *Batson*. (*Id.* at 48a.)

A. Mr. Edmonds' Membership in Operation PUSH is Not Race Neutral

The State's exclusion of Mr. Edmonds based, at least in part, upon his membership in Operation PUSH, violated the prohibition on race-based peremptory strikes. At trial, the prosecutor claimed that he excluded Mr. Edmonds because of his "8-year employment at age 53 years of age and the statement that he had been a student until 45 years of age,

coupled with his membership of PUSH.[2]" (emphasis added). (*Id.* at 106a.) The Illinois Appellate Court recognized that Operation PUSH is an organization whose racial composition is predominately, if not exclusively, African-American and that any exclusion on that basis should be treated with suspicion. (*Id.* at 48a.) The Illinois Appellate Court concluded that membership in Operation PUSH is not a race-neutral reason for a peremptory challenge. Other courts have endorsed the idea that excluding a juror simply because of his membership in an all-black organization is not constitutionally permissible. *Randolph v. State*, 416 S.E.2d 117, 119 (Ga. Ct. App. 1992) (bias could be shown by membership in an all-black profession or social organization "would be based upon an impermissible assumption ultimately arising solely from the juror's race"). In Pecor's case, the State intentionally excluded an African-American male because he was a member of an African American civil rights organization. Mr. Edmonds' membership in Operation PUSH can in no way be construed as anything but a racial reason for his exclusion from Pecor's jury.

B. The Prosecutor Did Not Object to Caucasian Jurors Who Were Substantially Similar to Mr. Edmonds

The trial court's conclusion that the other reasons identified by the prosecutor were race neutral is an unreasonable determination of the facts in light of the

[2] Since prosecutor concedes his two part motivation included Mr. Edmonds' student/employment status "*coupled*" with his Operation PUSH membership, prosecutor's race-based motive (Operation PUSH) appears to have equally motivated his strike of Mr. Edmonds. The Illinois courts never found, nor even addressed, whether the prosecutor would have excluded Mr. Edmonds solely based on his student/employment status.

evidence presented to the trial court. Where the prosecutor's "neutral" explanation is an obvious mask for a race based challenges, the prosecutor has not met his burden under *Batson*. A *Batson* violation occurs when a peremptory challenge is exercised against jurors of one race but not jurors of another race with comparable characteristics. *Id.*; *U.S. v. Sowa*, 34 F.3d 447, 452 (7th Cir. 1994). "A comparative analysis of jurors struck and those remaining is a well-established tool for exploring the possibility that that facially race-neutral reasons are a pretext for discrimination." *Turner v. Marshall*, 121 F.3d. 1248, 1251 (9th Cir. 1997). In this case, the trial court failed to compare Mr. Edmonds and the other excluded African-Americans with Mr. Foley and other similarly situated Caucasian empanelled jurors.

The prosecutor claims that he excluded Mr. Edmonds, a former student, because he was an eight year employee with the Chicago Transit Authority and a member of Operation PUSH (Pet. App. 106a.) The trial court found this to be race neutral and not a pretext for racial motives. The trial court apparently ignored the strikingly similar characteristics of Mr. Edmonds and Mr. Foley. The Illinois courts' failure to at least compare the excluded African-American to a similarly situated Caucasian who was not excluded is patently unreasonable. Such a comparison would have demonstrated that the only substantive difference between Mr. Edmonds and Mr. Foley is their different race of each man.

If the Illinois courts had compared Mr. Edmonds and Mr. Foley, such a comparison would have revealed both were fathers in their mid-fifties. Both served in the United States Army in the early 1950s and were members of the Veterans of Foreign Wars. Both enjoyed physical fitness activities in their spare time. Both lived in the Chicago area for over 30 years. Mr. Edmonds had been employed for eight years with

the CTA, while Mr. Foley had been a beer truck driver for 12 years. Both men appeared to be active in their communities; Mr. Edmonds, as a member of PUSH and the Chicago Urban League, and Mr. Foley as a member of the St. Maria's Father's Club. Yet, the State claims to have excluded Mr. Edmonds in part, because of his eight-year employment with the CTA and his status as a student prior to his CTA job. The State did not, however, exclude Mr. Foley, a Caucasian with strikingly similar characteristics. Notably, Mr. Foley was not asked what he did before his current job. It appears that the State was more concerned about Mr. Edmonds' employment history than Mr. Foley's.

The record reveals the only difference between the clubs that Mr. Edmonds and Mr. Foley belonged to is that Operation PUSH is an African-American civil rights organization. Indeed, the appellate court stated that the fact that Pecor failed to show that any empanelled jurors belonged to a "racial or ethnically focused" organization defeated his *Batson* petition. However, if the failure to show that no other juror belonged to a racial organization defeated the claim, then the prosecutor's exclusion of Mr. Edmond's was necessarily based on race because race is the only distinguishing factor.

C. Lower Courts Incorrectly Applied the Mixed Motive Analysis to the Peremptory Strike of Mr. Edmonds

The Illinois Appellate Court, while holding that an exclusion based on membership in an all-black organization was suspicious, nonetheless concluded that the presence of other neutral reasons for Mr. Edmonds diluted this suspicion. (*Id.* At 48a.) In upholding the prosecutor's exclusion of Mr. Edmonds, the court utilized a mixed-motives analysis.

The United States Court of Appeals for the Seventh Circuit ultimately supported the decision reached by the Illinois Appellate Court but refused to address whether mixed motives was the correct analysis to use with potential *Batson* violations. (Pet. App. 7a-8a.) Rather, the Court of Appeals held that the issue presented was not whether mixed motives analysis was the proper test, but whether it was unreasonable. (*Id.*) The Seventh Circuit went on to clarify that it did not endorse the use of mixed motives analysis over the taint analysis. (*Id.*) It is therefore left for the Court to determine whether the mixed motives test is reasonable under *Batson*.

D. The Exclusion of Mr. Edmonds Violates *Batson* Under the Taint Test

The taint test is the correct test to employ when weighing whether an exclusion was racially motivated and in violation of *Batson*. Under the taint test, the peremptory strike of Mr. Edmonds was clearly a violation of *Batson*. The prosecutor's race-based reason for excluding Mr. Edmonds because of his membership in Operation PUSH tainted the whole jury selection proceeding despite the presence of other racially neutral explanations. *Rector v. State*, 444 S.E.2d 862, 865 (Ga. Ct. App. 1994). An admission by a prosecutor that race was a factor in the exclusion process gives rise to a discriminatory purpose and violates the equal protection mandates of *Batson*. *Payton v. Kearse*, 495 S.E.2d 205, 209 (S.C. 1998); *see also Speaker v. State*, 740 S.W.2d 486, 489 (Tex. Ct. App. 1987) (holding that "while we realize that it may be unrealistic to expect the prosecutor to put aside every improper influence when selecting a juror .... that is exactly what the law requires"); *Rector*, 444 S.E.2d at 865 (concluding that race-neutral explanations do not cure stereotypical reasoning employed in using a peremptory strike); *In re Sockwell*, 675 So. 2d 38, 41 (Ala. 1995)

(concluding that a non-race-neutral reason for a strike will not "cancel out" a reason based on race); *State v. Lucas*, 18 P.3d 160, 163 (Ariz. Ct. App. 2001) (citing *Payton*, 495 S.E.2d at 210) ("[r]regardless of how many other nondiscriminatory factors are considered, any consideration of a discriminatory factor directly conflicts with the purpose of *Batson* and taints the entire jury selection process").

Petitioner's jury selection was impermissibly tainted by the prosecutor's race-based exclusion of Mr. Edmonds. The Illinois courts' analysis of Mr. Edmonds' exclusion and determination that it was not a *Batson* violation was unreasonable.

CONCLUSION

Gregory Pecor is unlawfully incarcerated because his conviction was obtained in violation of federal law and the Constitution. The prohibition on race-based peremptory challenges is clearly established federal law. The only reasonable conclusion based on the record is that the prosecutor excluded Mr. Edmonds because he was African-American. The taint test, as opposed to the mixed motives test, should be utilized to address this discriminatory strike. Under the taint test, the prosecutor's race-based motive behind Mr. Edmonds strike tainted the whole proceeding.

For the reasons set forth above, the Petitioner, Gregory C. Pecor, requests that this Court grant his Petition for Writ of Habeas Corpus.

Respectfully submitted,

Michael R. Mulcahy
Counsel of Record
Kelly A. Tautges
Vedder, Price, Kaufman & Kammholz
222 North LaSalle Street
Suite 2600
Chicago, IL 60601-1003
Telephone: (312) 609-7500
Facsimile: (312) 609-5005

Counsel for Petitioner,
Gregory C. Pecor

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 01-3916

[Filed January 8, 2003]

GREGORY PECOR,
Petitioner-Appellant,

v.

JONATHAN R. WALLS,
Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 98 C 6103
Wayne R. Andersen, Judge

JUDGES:
Before Hon. KENNETH F. RIPPLE, Circuit Judge,
Hon. ILANA DIAMOND ROVNER, Circuit Judge,
Hon. DIANE P. WOOD, Circuit Judge.

ORDER

Gregory Pecor was convicted of murder, armed robbery, and residential burglary, and after exhausting his state court remedies, he filed a petition under 28 U.S.C. § 2254, arguing that the state prosecutor improperly exercised race-based peremptory challenges against African-American venirepersons. The district court denied Mr. Pecor's petition, and on appeal Mr. Pecor focuses exclusively on the strike against potential juror Chuck Edmonds. We affirm.

During jury selection for Mr. Pecor's trial, the prosecution exercised four of its first five peremptory challenges against African-American venirepersons, including Chuck Edmonds. Mr. Edmonds was fifty-three years old at the time and, for the previous eight years, had worked as a ticket agent for the Chicago Transit Authority ("CTA"). When the judge asked him what he did before working for the CTA, Mr. Edmonds answered, "Student." The judge did not inquire further into his work history, but asked if he belonged to any social clubs, groups, or organizations. Mr. Edmonds replied that he was a member of the Chicago Urban League, Operation PUSH, and the American Legion.

After the prosecutor struck Mr. Edmonds and the other African-American venirepersons, defense counsel objected, arguing that the prosecutor's challenges were based on race and that Mr. Pecor was entitled to a hearing under *Batson v. Kentucky*, 476 U.S. 79 (1986). The prosecutor argued against conducting a hearing because Mr. Pecor, a white male, was not the same race as the African-American venirepersons. Relying on *People v. Holland*, 121 Ill. 2d 136 (1987), the

trial judge denied the request for a hearing because Mr. Pecor did not have standing to challenge the exclusions.

While Mr. Pecor's appeal of his convictions was pending, the Supreme Court of the United States decided *Powers v. Ohio*, 499 U.S. 400, 415 (1991), which held that in order to challenge a race-based exclusion, the defendant need not be the same race as the excluded juror. Based on *Powers,* the Illinois appellate court remanded the case to the trial court for a *Batson* hearing, *People v. Pecor*, 213 Ill. App. 3d 472 (1st Dist. 1991), and the Supreme Court of Illinois affirmed, *People v. Pecor*, 153 Ill. 2d 109 (1992).

During the *Batson* hearing the trial judge concluded in the interest of judicial economy that Mr. Pecor had established a prima facie case of race-based peremptory challenges. Before requiring the prosecutor to explain his reasons for excluding the African-American jurors, the judge characterized the challenges as "totally innocent" and "unintentional":

> Judge Dwyer,[1] I have found that, albeit a totally innocent one on your part, but nevertheless they changed the rules on you and they changed the rules on me in this case, and I therefore have found that, although I do not believe that there is a prima facie case established in this case at all, in the interest of judicial economy in the event that a reviewing court might disagree with me, I'm going to make a finding,

---

[1] Thomas Dwyer, the prosecutor during Mr. Pecor's trial, had become a Circuit Court judge in Cook County.

> sir, that there was an unintentional but nevertheless prima facie basis, and at this time I'm going to ask you, sir, as the lead prosecutor in that case to give the court your explanation for the exclusion of certain jurors, if you are willing to do so, sir.

The prosecutor then explained that he excluded Mr. Edmonds based on his employment history and his membership in Operation PUSH:

> In the course of the voir dire Mr. Edmonds indicated that he was a student until he was 45 years of age, that he was single, he had been -- he was 53 years old, had been employed at CTA for eight years and that he had been a member of an [sic] Operation PUSH.
>
> It was the 8-year employment at the age of 53 years of age and the statement that he had been a student until 45 years of age, coupled with membership of PUSH. The totality of those circumstances that the State exercised its fourth peremptory challenge [sic].

The judge concluded that there was no *Batson* violation because the prosecutor gave "valid and legitimate race neutral reasons" for excluding Mr. Edmonds and that those reasons were "non-pretextual."

Mr. Pecor appealed to the Illinois appellate court, which presumed for purposes of the appeal "that Operation PUSH is an organization whose racial composition is predominantly if not exclusively African-American." *People v. Pecor*, 286 Ill. App. 3d 71, 81 (1st Dist. 1996). Based on that presumption, the court viewed the exclusion of Mr. Edmonds

"with suspicion," and concluded that "the rejection of Edmonds on the basis of his membership in Operation PUSH presents the appearance that Edmonds' strike was racially motivated." *Id.* at 80-81. Nevertheless, the court concluded that there was no *Batson* violation because the prosecutor's other independent race-neutral reasons for striking Mr. Edmonds "diluted the suspicion of a race-based exclusion which may well have been created if Edmonds' membership in Operation PUSH were the only reason given." *Id.* The Supreme Court of Illinois denied Mr. Pecor's petition for leave to appeal. *People v. Pecor*, 173 Ill. 2d 539 (1997).

Mr. Pecor then filed a petition under § 2254 in the district court, arguing that the prosecutor improperly exercised race-based peremptory challenges against African-American venirepersons. He contended that the Illinois appellate court unreasonably applied *Batson* when it concluded that the prosecutor's reasons for the exclusions were race-neutral and non-pretextual. The district court concluded that the Illinois appellate court correctly applied *Batson* and that it would not "second guess" the court's conclusions.

On appeal Mr. Pecor argues that Mr. Edmonds's exclusion from the jury violated Batson's prohibition against race-based peremptory strikes. Specifically, Mr. Pecor argues that (1) the exclusion of Mr. Edmonds based on his membership in Operation PUSH was not race-neutral; (2) the prosecutor's other reasons for the exclusion were pretextual; and (3) the trial judge predetermined the outcome of the *Batson* hearing by characterizing the prosecutor's exclusions as "totally innocent" and "unintentional" before the prosecutor explained his reasons. In order to obtain habeas corpus relief, Mr. Pecor must show that the state court's

adjudication of his *Batson* claim was "contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or that the state court's factual determination was unreasonable in light of the evidence presented, 28 U.S.C. § 2254(d)(2). *See Williams v. Davis*, 301 F.3d 625, 631 (7th Cir. 2002); *McCain v. Gramley*, 96 F.3d 288, 290 (7th Cir. 1996). "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams v. Taylor*, 529 U.S. 362, 413 (2000).

The Illinois appellate court resolved Mr. Pecor's *Batson* claim without deciding whether an exclusion based on membership in Operation PUSH is race-based. Instead, the court concluded that the presence of other independent race-neutral reasons for striking Mr. Edmonds "diluted the suspicion of a race-based exclusion which may well have been created if Edmonds' membership in Operation PUSH were the only reason given." *Pecor*, 286 Ill. App. 3d at 80-81. Thus, the Illinois appellate court employed a "mixed motives" analysis, i.e., the peremptory strike is invalid if motivated by race, but the government is entitled to the defense that it would have taken the same action in the absence of the impermissible motive. *See Gattis v. Snyder*, 278 F.3d 222, 234-35 (3d Cir. 2002), *citing Mt. Healthy City Sch. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284-87 (1977); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 270 n.21 (1977).

All circuits that have addressed the mixed motives analysis have held that it is proper, or a least not unreasonable, under *Batson*. *Gattis*, 278 F.3d at 234-35; *Weaver v. Bowersox*, 241 F.3d 1024, 1032 (8th Cir. 2001); *Wallace v. Morrison*, 87 F.3d 1271, 1274 (11th Cir. 1996); *Howard v. Senkowski*, 986 F.2d 24, 30 (2d Cir. 1993); *see also Jones v. Plaster*, 57 F.3d 417, 421 (4th Cir. 1995) (applying mixed motives analysis without explicitly determining its validity under *Batson*). Those circuits imported the mixed motives analysis from equal protection jurisprudence. *See Mt. Healthy*, 429 U.S. at 284-87; *Village of Arlington Heights*, 429 U.S. at 270 n.21. This circuit has yet to address the issue, but Judge Cudahy advocated the mixed motives analysis in his dissent in *Holder v. Welborn*, 60 F.3d 383, 390-92 (7th Cir. 1995).

The mixed motives analysis, however, is not universally accepted. At least five states have rejected it in favor of the "taint rule," i.e., a race-based reason for excluding a potential juror taints any race-neutral reason and violates *Batson*. *State v. Lucas*, 18 P.3d 160, 163 (Ariz. Ct. App. 2001); *Payton v. Kearse*, 495 S.E.2d 205, 210 (S.C. 1998); *Ex parte Sockwell*, 675 So.2d 38, 41 (Ala. 1995); *Rector v. State*, 444 S.E.2d 862, 865 (Ga. Ct. App. 1994); *Benavides v. Am. Chrome & Chem. Inc.*, 893 S.W.2d 624, 626-27 (Tex. App. 1994). Additionally, Justice Marshall, in a dissent from the denial of a petition for a writ of certiorari, made thoughtful arguments against applying the mixed motives analysis (which he called the "but for" test) to *Batson* cases. *Wilkerson v. Texas*, 493 U.S. 924 (1989).

Although we have yet to decide whether a mixed motives analysis is proper in the *Batson* context, we decline to do so now because all that is before this court is whether such an

analysis is unreasonable under Batson. *See Gattis*, 278 F.3d at 234-35 (examining mixed motives analysis in the context of a § 2254 petition and concluding that state court did not unreasonably apply *Batson*). Five federal circuits have held that the mixed motives analysis is proper, or at least not unreasonable, under *Batson*. Moreover, the Supreme Court declined to address the issue, and *Batson* itself does not explicitly preclude employing a mixed motives analysis. Although this court is not endorsing the use of the mixed motives analysis over that of the "taint rule," we must conclude that the Illinois appellate court's use of the mixed motives analysis was not an unreasonable application of *Batson*.

Because the mixed motives analysis is not unreasonable under *Batson*, we need not decide whether membership in Operation PUSH is a race-neutral reason for a peremptory strike, as long as the prosecutor's other reasons for Mr. Edmonds's exclusion were race-neutral. The prosecutor explained that he struck Mr. Edmonds because of his "8-year employment at the age of 53 years of age and the statement that he had been a student until 45 years of age." Neither of these reasons implicates race, and thus, as the Illinois appellate court found, they are facially race-neutral. *Batson*, 476 U.S. at 89 n.12 (employment history is race-neutral); *Alverio v. Sam's Warehouse Club, Inc.*, 253 F.3d 933, 941 (7th Cir. 2001) (same).

The Illinois appellate court also found that the race-neutral reasons were non-pretextual because the court credited the trial judge's assessment of the prosecutor's integrity and experience with *Batson*. Those considerations are proper, *Purkett v. Elem*, 514 U.S. 765, 769 (1995); *Batson*, 476 U.S.

at 98 & n.21, and a state court's factual findings, such as a prosecutor's motive in the *Batson* context, are presumed correct. 28 U.S.C. § 2254(e)(1); *Coulter v. Gilmore*, 155 F.3d 912, 920 (7th Cir. 1998). Mr. Pecor appears to be inviting this court to reassess the facts regarding the prosecutor's characterization of Mr. Edwards's employment history, but his arguments fall short of the clear and convincing evidence required under § 2254(e)(1) to rebut the presumption of correctness. Therefore, we conclude that the Illinois appellate court reasonably applied *Batson* when it found that there were non-pretextual, race-neutral reasons for striking Mr. Edmonds.

Finally, Mr. Pecor argues that the trial judge predetermined the outcome of the *Batson* hearing by characterizing the peremptory challenges as "totally innocent" and "unintentional" before the prosecutor explained his reasons for those challenges. Essentially, Mr. Pecor is arguing that the judge was biased, but Mr. Pecor never raised this issue in the state courts, and this court's grant of a certificate of appealability was limited to the *Batson* issue. Thus, the bias claim is procedurally defaulted, and because Mr. Pecor has not attempted to establish cause and prejudice for the default, we decline to address the claim. *See Momient-El v. DeTella*, 118 F.3d 535, 538 (7th Cir. 1997).

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

No. 98 C 6103

[Filed September 4, 2001]

UNITED STATES OF AMERICA ex rel. GREGORY C. PECOR, Petitioner,	)
v.	)
THOMAS F. PAGE, Respondent.	)

JUDGES:
Wayne R. Andersen, United States District Judge.

MEMORANDUM OPINION AND ORDER

This case is before the Court on the 28 U.S.C. § 2254 petition for a writ of habeas corpus brought by Gregory Pecor. After a jury trial, Pecor was convicted of murder, armed robbery and residential burglary and was sentenced to a term of life in prison without parole for the charge of

murder, thirty years imprisonment for the charge of armed robbery and fifteen years imprisonment for the charge of residential burglary. In the instant petition, Pecor alleges that: (1) the jury was unconstitutionally selected and impaneled in violation of *Batson v. Kentucky,* 476 U.S. 79 (1986); and (2) he was denied the effective assistance of counsel. For the following reasons, his petition is denied.

BACKGROUND

The following facts are the facts as set forth by the court in Pecor's appeal to the Illinois Appellate Court. *People v. Pecor*, 286 Ill. App. 3d 71, 675 N.E.2d 141 (1st Dist. 1996). We accord a presumption of correctness to these state court findings. 28 U.S.C. § 2254(d).

At trial, the defendant did not dispute the fact that he killed the victim, Carol Holwell, on Friday, February 14, 1986. He contended, however, that he did not possess the requisite mental state to commit the offense of murder due to a long-time addiction to alcohol and cocaine and his ingestion of cocaine on the day of the murder.

The evidence at trial showed that the defendant had previously lived with Steve Otten, a drug dealer who supplied the defendant with cocaine, and Otten's live-in girlfriend, Carol Holwell, the victim. After the defendant moved out of Otten's house, he continued to purchase cocaine from Otten; and the relations between the three were amicable. Testimony by Merrionette Park Police Officer James O'Connell and Assistant State's Attorney Matthew Carmody showed that during questioning at the police station the defendant admitted that he stabbed the victim after entering Otten's home and

being surprised by her presence. The defendant told them that after he thought Holwell was dead, he attempted to open a safe in Otten's house. As he was removing its contents, he heard a noise, ran and saw the victim going out the side door. The defendant stated that he dragged her back into the house, grabbed the knife again, took her down the hallway, jumped on top of her, "started cutting her again,"and killed her. He then returned to the safe from which he took a .45 caliber automatic pistol, some cocaine and $1,900. Those items, which were recovered from the defendant's home, pursuant to the defendant's instructions to the police, were introduced into evidence. Other physical evidence and exhibits which connected the defendant to Holwell's killing, not here relevant, were introduced by the State.

The defendant, who was 32 at the time of the killing, testified that he began using drugs when he was a freshman in high school. At that time, he used marijuana and alcohol and experimented with LSD, mostly on weekends. While in the army, he used cocaine and barbiturates and regularly injected heroin into his veins. He continued to use drugs and alcohol on a daily basis after he left that service in 1973. The defendant stated his drug and alcohol usage on a daily basis continued during the 1970's; that in 1981, he enrolled in and successfully completed an in-patient alcohol abuse program at Hines Veterans Hospital; and that he abstained from alcohol and drugs for about six months. The defendant stated that from the summer of 1983 until the summer of 1984, he lived with Steve Otten, a boyhood friend. Carol moved in sometime in January 1984. During that time the defendant bought cocaine from Otten and continued to do so after he moved out. The defendant said that Otten kept the cocaine and the chemicals used for processing it in a safe in the closet in his

bedroom. Otten gave the defendant the combination.

The defendant further testified that during late fall 1985 and early winter 1986 he was unable to find steady employment and his cocaine usage steadily escalated. He was using between one and one-half to two and one-half grams per day and began "free-basing"as well as "snorting."The defendant stated that after using cocaine he would get so "wired up that [he] would get trembles, tremors and * * * would shake."To counter that reaction, he would drink alcohol.

The defendant stated that on February 14, 1986 he ingested about one-quarter to one-half gram of cocaine in the morning. In the early afternoon he went to Otten's house to drop off some money he owed for cocaine. (At that time, the defendant's consumption of cocaine had increased to two to four grams per day.) Carol was there so he gave her the money. They talked for about a half hour, the defendant had a beer and left. Sometime after 5:00 p.m., the defendant realized he did not have enough cocaine for the weekend so he went back to Otten's house. He stated that he did not expect anyone to be there and went to the back door, which was never locked, went to the safe in Otten's bedroom and opened it. On the dresser nearby was a dirty plate and small steak knife. The defendant took the knife, dipped it into the envelope containing cocaine, snorted the cocaine, got an immediate "rush"and then saw someone walk into the room.

The defendant testified that for the next several days he had no conscious memory of what transpired in the room. He stated that he did not know that he had killed Carol when he initially spoke to the police on the following Sunday and

Monday. He stated that he first began having flashbacks of being at Otten's house on Tuesday when he was questioned at the police station by an officer. The defendant stated, "I was like in a movie that whenever he reminded me of something, or he would say something that it [sic] would recall a memory of my being over at the house on Friday afternoon."He said that he realized he killed Carol and began talking to the police about what he remembered after the assistant state's attorney told him his bloody palmprints were found on the handle of the steak knife.

On cross-examination, the defendant denied that he told any police officer or assistant state's attorney that after Holwell fell to the floor he went back to the bedroom to look for money. He also denied saying that he saw Holwell crawling away and stabbed her in the back. The defendant also testified that he used cocaine in the parking lot of the police station on Tuesday evening before he went into the station and that he left four grams of cocaine in the glove compartment of his car. He stated that he felt a rush but that he had no trouble navigating through the police station, understanding what was being said to him or responding to the questions. He admitted that he refused to sign the statement that had been prepared for him and stated that he was never asked to give a statement to a court reporter.

James Thomas O'Donnell, a defense witness and expert in the field of pharmacology and pharmacy, testified that cocaine can have an effect on a person's memory and can cause blackouts where one does not recall what he or she did but was awake while doing it. On cross-examination, O'Donnell admitted that the effect cocaine would have on a person could not be determined without knowing the purity of the drug. On

redirect, O'Donnell stated that cocaine is a mind-altering drug that can "affect a person's ability to act in a knowing fashion, knowing what he's doing."He also stated that it could alter a person's judgment and mind to the effect that the person does not know what he intentionally is doing. On recross, he stated that his knowledge of cocaine was not based on first-hand experience, experimental clinical studies or observations of cocaine use.

On rebuttal, an assistant state's attorney testified that on the Tuesday evening while the defendant was being questioned, he never presented the defendant with a typed statement to sign; the defendant originally agreed to give a court-reported statement but changed his mind; and the defendant stated that he stabbed Holwell, went to the safe to search for money, and stabbed Holwell again as she attempted to crawl away. That testimony was corroborated by one of the officers who was present in the interview room on Tuesday evening. Three officers testified concerning defendant's claim that he ingested cocaine immediately before entering the police station on Tuesday evening. One officer who was driving a police car and followed the defendant as he drove to the police station, stated that he pulled his car behind the defendant's car upon their arrival at the station. He stated that the defendant remained in his car long enough to shut off the engine and exit the car. He also testified that he was present during the execution of the search warrant of the defendant's car and that no cocaine was recovered from the glove compartment. A second officer, who observed the defendant when he arrived at the police station, stated that he saw nothing that would indicate that the defendant had taken any kind of intoxicant. A third officer testified that he observed the defendant after he had pulled his car into the police station

driveway and that the defendant stayed in his car for approximately fifteen seconds before exiting it. The State then introduced defendant's three prior robbery convictions for purposes of impeachment.

At the sentencing hearing, Doctor Gerson Kaplin, a psychiatrist, testified that he examined the defendant to determine whether he was fit to stand trial and to determine his mental status at the time of the alleged crime. During the examination, the defendant appeared coherent and rational and gave appropriate answers to the questions asked. The defendant told him that he decided to rob Otten's house since he was familiar with it, knew it was unlocked, knew the combination to the safe, expected to find drugs and money, and thought no one would be home. The defendant also told him that while he was taking the money and drugs, the victim surprised him. As he started to leave, he took a knife that was lying on the kitchen table and stabbed her several times. He stated that when the victim attempted to crawl away, he stabbed her a few more times and then went home. Kaplin further stated that the defendant told him that he was drinking that day but that he knew what he was doing. According to Kaplin, the defendant told him what happened in a clear and concise manner. On cross-examination, Kaplin stated that the defendant told him that he did not know why he stabbed the victim.

The State then called three individuals who were the victims of robberies wherein the defendant was one of the prepetrators. Two of the victims stated that the defendant sprayed mace on them and a third stated that another man with the defendant was carrying a knife. A fourth witness, Officer J. Moller of the Alsip Police Department, testified

that the defendant was involved in a fourth robbery wherein the victim stated that the defendant had hit him over the head, choked him, punched him, and kicked him in the face. According to Moller, there no probable cause for the robbery charge because the victim was unconscious when the property was taken.

Also admitted into evidence was defendant's misdemeanor theft conviction in 1974 for which the defendant received one year adult probation and defendant's military records which indicated that action was taken against him for possession of marijuana and for desertion for having returned three months later from leave.

The defendant then presented the testimony of a former girlfriend who indicated that he had treated her and her children well during the year and a half period of time that they were dating and the testimony of three Cook County Department of Corrections employees who testified concerning the defendant's behavior while he was an inmate. One, a deputy sheriff, indicated that the defendant worked for him in an entrusted area and that the defendant was honest and respectful. The other, who was in charge of special services and maintenance, indicated that the defendant had worked on his crew for about fourteen months and during that time had not presented any behavioral problems. The third, a mental health specialist, indicated the defendant was respectful of him and the officers, had never been in any fights, had never been in any trouble, helped keep order in the dorms, was a stabilizing influence and participated in many work activities. On cross-examination, he stated that he was aware that the defendant had once stockpiled medicine on took 18 pills "to get high." Additional witnesses who testified

as to the defendant's good character included a friend, who had known the defendant for twelve years and who tried to start a business with the defendant; the defendant's mother; the defendant's two brothers; and a next-door neighbor.

Doctor Jean Daley, a psychologist, testified that she conducted a psychological evaluation of the defendant over a three to four hour period of time. In connection with her evaluation, she also reviewed the psychiatric evaluation of the defendant, a Veteran's Administration hospitalization report, the psycho-pharmacologist report, some reports from the county jail, the state's attorney's interviews and police reports. In those reports, she saw depression, evidence of blackouts, feelings of disorientation, loss of self, a daze-like trance, and alcoholic and drug needs. Based upon those reports and her evaluation interviews with the defendant, Daley opined that the defendant was an alcoholic dependent person, a cocaine abuser and had suffered "from a brief reactive psychosis."

Daley described cocaine usage, the euphoric effects of the drug and its addictiveness. She stated that in the advanced stages of addiction, paranoia is common and the person loses his or her sense of reality and is unable to distinguish between what is real and what is not real. She stated that if the person is addicted and cannot obtain the drug, he or she becomes "totally discombobulated"and is "totally destroyed and disorientated, [and is] fixated on getting more." She also stated that blackouts and psychosis are possible results of cocaine abuse. She defined psychosis as a loss of sense of reality, where the mind hallucinates and has delusions and where the person may believe that someone is out to kill or destroy him. In Doctor Daley's opinion, the defendant was

addicted to cocaine and alcohol, he believed he was incapable of functioning without them, and he felt totally inadequate.

Daley defined a "reactive psychosis" as a brief psychotic break, lasting from two hours to a few weeks, after which time the person could function again. Daley stated that the psychosis is induced by extreme stress and internal environmental stress. According to Daley, the person who is in this state of agitation and anxiety projects that anxiety outward while trying to deal with what that person believes is an enemy that is "after" him or her. Daley stated that the pressure can become overwhelming such that an explosive reaction occurs. In Daley's opinion, at the time the defendant killed Carol Holwell, he was in a highly agitated state. He had to have drugs because he was going away for the weekend and did not want to be "exposed."

On cross-examination, Daley stated that she believed the defendant was disoriented and detached from reality for a couple of days before the killing and that the psychotic break occurred when he was at the safe. She stated that when she questioned the defendant she did not ask him specific questions regarding his activities that preceded the killing because she was "not interested in that." She also stated that the defendant was not in a psychotic reactive state when he left his house on the afternoon of February 14, 1986.

At the conclusion of the sentencing hearing the jury found that there were mitigating factors sufficient to preclude a death sentence.

On direct appeal defendant Pecor raised several issues. The Appellate Court limited its consideration to whether the

trial judge erred in ruling that the defendant, a white male, did not have standing to object to the prosecution's use of peremptory challenges excluding venire persons from the petit jury. Based on *Batson v. Kentucky*, the trial court ruled that Pecor did not have standing to object to the exclusion of black venire persons because he was not a member of a cognizable racial group and that the juror's were not members of the defendant's racial group. *Batson v. Kentucky*, 476 U.S. 79 (1986). The Appellate Court reversed the trial court's ruling and remanded the case to the trial judge with instructions to conduct a *Batson* hearing.

The Appellate Court held that Pecor, a white male, had standing to object to the prosecution's use of peremptory challenges excluding black venire persons from the petit jury. Between the time that the trial court ruled and the Appellate Court considered the case, the United States Supreme Court decided *Holland v. Illinois*, 493 U.S. 474 (1990). In *Holland*, the Supreme Court held that a white criminal defendant has standing under the Constitution to raise an objection to the prosecution's use of peremptory challenges excluding black venire persons from a petit jury; but such exclusion was not a violation of the fourteenth amendment. *Id.* at 474. After oral argument in this case, the Supreme Court decided *Powers v. Ohio* and held that a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race. *Powers v. Ohio*, 499 U.S. 400 (1991). The Appellate Court applied Powers retroactively to Pecor's appeal. The Appellate Court found that the defendant raised a legitimate and well grounded objection as propounded in *Powers* and Illinois case law because the prosecution used

four of its first five peremptory challenges to exclude black venire persons.

The State appealed the Appellate Court's ruling to the Illinois Supreme Court. The Illinois Supreme Court, in a lengthy and well reasoned opinion, affirmed the Appellate Court's decision holding that the defendant should be allowed to create a record and present to the trial court evidence of a prima facie case under *Batson*. *Pecor*, 153 Ill. 2d at 125-26.

On remand, the trial court conducted a *Batson* hearing. At the conclusion of the *Batson* hearing the trial court found that the state provided race-neutral explanations for its exclusion of six black venire persons and that no *Batson* violation had occurred. Pecor appealed the trial court's *Batson* ruling to the Illinois Appellate Court. The Appellate Court affirmed the trial court's ruling. On June 4, 1997, the Illinois Supreme Court denied Pecor's petition for leave to appeal. On November 10, 1997, the U.S. Supreme Court denied Pecor's petition for Writ of Certiorari.

Pecor filed this present petition for a writ of habeas corpus on September 29, 1998 pursuant to 28 U.S.C § 2254.

DISCUSSION

I. *Standard of Review*

A federal court may issue a writ of habeas corpus if a petitioner demonstrates that he is in state custody in violation of the Constitution or law or treaties of the United States. 28 U.S.C § 2254(a); *McGowan v. Miller*, 109 F.3d 1168, 1172 (7th Cir. 1997). The Antiterrorism and Effective Death

Penalty Act ("AEDPA"), 28 U.S.C. § 2254, provides, in pertinent part, that habeas relief may be granted only if the adjudication of the claim by the state court: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding. 28 U.S.C § 2254(d).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court attempted to clarify the applicable standard of review within the meaning of AEDPA. The Court noted that the text of AEDPA does not explicitly prescribe a recognizable standard of review for applying either of the statutory clauses. *Id.* at 385. The Court recognized the need for further clarification and direction to federal courts and concluded that "AEDPA plainly sought to ensure a level of 'deference to the determinations of state courts,' as long as those decisions do not conflict with federal law or apply federal law in an unreasonable way." *Id.* at 376. Additionally, the Supreme Court determined that "Congress wished to curb delays, to prevent 'retrials' on federal habeas and to give effect to state convictions to the extent possible under law. When federal courts are able to fulfill these goals within the bounds of the law, AEDPA instructs them to do so." *Id.* at 376. Therefore this court is directed to apply a deferential standard of review to state court decisions unless we determine that the state court violated federal law.

II. *Alleged Batson Violation*

Pecor argues that the trial and Appellate Court were

unreasonable in determining that no *Batson* violation occurred. For the following reasons, we find that the State's exclusion of venire persons was race-neutral, the jury was properly impaneled, and that the trial and Appellate Court applied the correct legal standard.

When a defendant objects to the State's exclusion of venire persons alleging that the exclusions were based on race, the defendant must establish a prima facie case of discrimination. The defendant must show: (1) that the prosecutor used peremptory challenges to remove members of a racial group from the venire; and (2) that these facts and any other relevant circumstances raise an inference that the prosecutor used his challenges to exclude potential jurors based on race. *Batson*, 476 U.S. at 96-89. The defendant is entitled to rely on the fact that the peremptory challenges enable those to discriminate who are of a mind to discriminate. *Id.* at 96. In deciding whether the defendant has established a prima facie case, the trial court must consider all relevant circumstances, including such matters as patterns of strikes against black jurors in the venire and the prosecutor's questions and statements in voir dire and in exercising his challenges. *Id.* at 96-97. The defendant can also point to similarly situated individuals who were not excluded from the venire. Once the defendant has established a prima facie case the burden shifts to the state to present a race-neutral explanation for the challenges to black jurors. *Id.* at 96-97.

On remand the trial court was not convinced that the defendant had established purposeful discrimination, but, in the interest of judicial economy, proceeded on the basis that a prima facie case had been established. Therefore, the

burden shifted to the state to provide race-neutral explanations for its challenges.

In this case, the issue is whether the trial and Appellate Court erred in finding no *Batson* violation. At the time of trial there were six venire persons struck from the jury. Four were struck before the defendant's motion and two after the defendant's motion. Five venire persons were the subject of the *Batson* challenge and the subsequent appeal. The following is the Appellate Court's interpretation of the *Batson* hearing.

(1) Chuck Edmonds

> This venireprerson was a 53-year-old ticket agent with the Chicago Transit Authority. He held that position for eight years; was single; had lived in Chicago area for over thirty years; and had a sixteen-year-old son who sometimes resided with him. He was a veteran, having served in the army from 1951 to 1954 and belonged to the Chicago Urban League, Operation PUSH and the American Legion. When asked by the trial judge what he did before becoming a ticket agent, Edmonds responded, "Student." When asked whether he had any "feelings or viewpoints concerning the defense of intoxicated or drugged condition in a criminal case," he replied that he did; and at the request of defense counsel, further explained that
>
> "Its just one of the most horrendous things society has allowed to perpetrate [sic] the last 10 or 15 years is the whole thing of crime and drugs, and most of all ridiculous crimes seem to be drug or alcohol related,

and me as a father of a 16-year-old child, and I live in the inner city, I see this constantly."

Edmonds further stated that he did not think his feelings would have any effect on his ability to be impartial.

At the *Batson* hearing, the prosecutor gave the following explanation for his challenge of Edmonds:

"Mr. Edmonds indicated that he was a student until he was 45 years of age, that he was single, he had been--he was 53 years old, had been employed at the CTA for eight years and that he had been a member of an [sic] Operation PUSH.

It was the 8-year employment at the age of 53 years of age and that statement that he had been a student until 45 years of age, coupled with membership of PUSH. The totality of those circumstances that the State exercised its fourth peremptory challenge."

The prosecutor further stated that instability in the community was demonstrated by the fact that Edmonds had been a "professional student at the age of 45 years old."

(2) Carlos Lavington

This venireprerson was a 44-year-old supervisor for the Chicago Park District. Lavington worked for that entity for 18 years; described his job as "dealing with kids all day, gym;" and was a widower with two small

children. He stated that sometime in the late 1970's he was called to testify as a defense witness in a robbery case, a fact which he stated would not affect his ability to be fair and impartial.

At the *Batson* hearing, the prosecutor explained that he exercised a peremptory challenge at to Lavington because "he had testified as a defense witness in a robbery trial and that he was employed working with kids."

(3) Alberta Collins

This venireprerson was 50 years old; was single; was unemployed since 1972; lived in Chicago for 28 years; and was active in the Church of God and Christ. When asked what she did in her spare time, she stated that she watched television or read her bible.

At the *Batson* hearing, the prosecutor stated that he exercised a peremptory challenge as to Collins because she "was single and unemployed since 1972 and that she read the Bible." The prosecutor stated that the fact that Collins read the Bible gives "an inference that she would be against the death penalty."

(4) Joyce Joshawa

This venireprerson was 49 years old; was divorced; had been unemployed for four years; and had been terminated from her last employment as a factory worker. She lived at the same address since 1973.

At the *Batson* hearing, the prosecutor stated that he exercised a peremptory challenge as to Joshawa because she "had been unemployed, terminated from employment and had been off work for four years."

(5) Mark Anthony Gossitt

This venireprerson was 31 years old; was single; lived in Chicago; and had worked as a security guard for two years. Before working as a security guard, Gossitt worked as a dancer and had done so since he was nine years old. Gossitt stated that as a dancer he traveled the United States.

At the *Batson* hearing, the prosecutor stated that he exercised a peremptory challenge as to Gossitt because Gossitt had been a security guard for two years and prior to that time had been a dancer traveling around the United States. The prosecutor further stated that "it was the area in the field of entertainment in relation to the nature of the charge and the anticipated defense of drug intoxication that caused the prosecution concern regarding that individual."

At the conclusion of the *Batson* hearing, the prosecutor tendered his notes. The trial judge examined those notes, which it found to be "incredibly thorough" and totally corroborative of the *Batson* testimony. After hearing argument by both sides, the trial court concluded that the prosecutor had given valid and legitimate race-neutral reasons that were non-pretextual. The court specifically stated that in reaching that conclusion, it relied upon its knowledge

of the prosecutor's "honor and good integrity."

Pecor, 286 Ill. App. 3d at 75-77.

The State explained each of its reasons for exclusion. Four prospective jurors were excluded for reasons that included unemployment, instability in the community, prior testimony as a defense witness, and an inference that the venire person may be opposed to the death penalty. The court applied the requirements of *Batson* and found that each of the exclusions was not pretextual for racial discrimination.

The Appellate Court correctly and fairly applied the law. The only exclusion that raises any racial implication is that of Chuck Edmunds. Edmunds was excluded because he was a student until middle age and was a member of Operation PUSH. Edmunds' employment history and student status were race-neutral, but the Appellate Court questioned the racial implication of a membership in Operation PUSH. The Appellate Court presumed that, for the purposes of the appeal, Operation PUSH was an organization whose racial composition was predominantly if not exclusively African-American. The court treated this reason for exclusion with suspicion. The court found that the defendant failed to show that other venire persons who were chosen as jurors belonged to other racially or ethnically focused organizations. The court also opined that, other than Operation PUSH, there were other race neutral reasons for excluding Edmunds. The Appellate Court determined that, when viewed as a whole, the independent race-neutral reasons diluted the suspicion of race based exclusion which may have been created by Edmund's membership in Operation PUSH.

We reviewed the courts' analysis with regard to Chuck Edmunds because we were cognizant that membership in operation PUSH could be a pretext for racial exclusion. We conclude that the petitioner failed to present the court with similarly situated individuals who were not excluded and the State proffered a sufficiently race-neutral rationale for the exclusion. Therefore the Circuit Court and Appellate Court correctly denied petitioner's objection.

The Circuit Court correctly formulated and applied the law. It determined that the State's proffered reasons for exclusion were race-neutral. The Appellate Court engaged in a thorough evaluation of the trial court's analysis. Because both the Circuit Court and Appellate Court correctly applied the law to the facts, we will not second guess their conclusions. Furthermore, there is no evidence in the record to support petitioner's contention that the trial judge pre-determined the outcome. Based on an extensive review of the record we conclude that no *Batson* violation occurred.

III. *Ineffective Assistance of Counsel*

Pecor argues that the Appellate Court's determination that he was not denied effective of counsel was an unreasonable application of the relevant facts to the law. Pecor argues that he was denied effective assistance of counsel when his trial attorney failed to call Dr. Daley during the defense case-in-chief. Respondent argues that the Appellate Court's application of the two prong test set forth by the Supreme Court in *Strickland v. Washington* was reasonable. *Strickland v. Washington*, 466 U.S. 668 (1984). After examining the briefs and the Appellate Court's rationale, we find that the

court's application of the *Strickland* two-prong test and its application to the facts were reasonable.

Strickland governs ineffective assistance of counsel claims. The petitioner must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.* at 694. The court cannot grant federal habeas relief for ineffective assistance of counsel claims unless the state court's decision was contrary to or involved an unreasonable application of federal law as determined by the U.S. Supreme Court. 28 U.S.C. § 2254(d)(1); *Williams,* 529 U.S. at 367. To show ineffectiveness of counsel a defendant must show that the counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 694. To establish prejudice he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 694. Judicial scrutiny of counsel's performance must be highly deferential. *Id.* at 689.

The Appellate Court held that trial counsel's performance did not qualify as ineffective assistance of counsel as outlined by *Strickland*. The Appellate Court held that Pecor did not satisfy the first prong of the test because the trial counsel's overall performance, including his choice to call Dr. Daily at sentencing, was not objectively unreasonable. The court noted that Pecor did not deny that he killed the victim, but rather argued that he did not possess the requisite state of mind to commit murder. Defense counsel called the defendant and an expert in pharmacology to support Pecor's contention that he did not possess the requisite state of mind to commit murder.

At trial Pecor was given ample opportunity to assert his defense. Pecor testified on his own behalf and was able to explain to the jury in detail his history of drug and alcohol addiction. The defense expert corroborated Pecor's statements by explaining to the court and the jury the effects of long term addiction and the reactions of an individual who is abusing drugs. The decisions made by Pecor's trial counsel were reasonable and strategic in nature.

Although the Appellate Court did not find that Pecor satisfied the first prong, the panel analyzed the facts and applied them to the second prong. The second prong of *Strickland* requires that counsel's performance prejudice the defendant. The Appellate Court discussed defense counsel's decision to call a pharmacology expert to testify in support of the intoxication defense. The defense expert testified that cocaine usage could have an effect on a person's memory, could cause blackouts, could affect a person's ability to act in a knowing fashion, and could affect a person's judgment and mind so that the person does not know what he intentionally is doing. In addition the defendant testified about his long-term alcohol and drug addiction and about his ingestion of cocaine and his physical reaction to the drug on the day of the murder and the days following the murder. The panel found that Dr. Daley's testimony at sentencing was not new and independent evidence but rather corroborative evidence. Since Dr. Daley's opinions were based in part upon her reliance upon the credibility of the defendant and the information supplied to her by the defendant, the Appellate Court determined that her conclusions would have been weakened by the State's impeachment of the defendant. The Appellate Court, after a thorough analysis, determined that the defense theory of intoxication was presented, the adversarial process

was meaningful and the outcome of the trial would not have been different had Dr. Daley testified during the defendant's trial.

Defense counsel's decision to call Dr. Daley was strategic. We will not second guess a trial counsel's strategic or tactical decision. *United States v. Godwin*, 202 F.3d 969, 973 (7th Cir. 2000), *cert. denied* 529 U.S. 1138 (2000). The evidence presented at trial was sufficient to serve as a basis for acquittal. The jury weighed all of the evidence presented at trial that supported Pecor's defense theory of intoxication and found him guilty. At sentencing, the testimony by Dr. Daley was merely cumulative. Dr. Daley's testimony added nothing more to defendant's theory than the testimony which was presented at trial. The testimony served only to corroborate the trial testimony by Pecor and the defense expert. This decision represents a strategic choice by defense counsel, and it was not objectively unreasonable. Therefore it cannot serve as a basis for overturning the conviction.

CONCLUSION

The State courts accurately applied the correct federal law. Therefore, Pecor's petition for a writ of habeas corpus is denied. This case is terminated.

/s/_____
Wayne R. Andersen
United States District Judge

Dated: August 31, 2001

APPENDIX C

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, THIRD DIVISION

No. 1-88-1235

[Filed December 23, 1996]

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

GREGORY PECOR,
Defendant-Appellant.

Appeal from the Circuit Court of Cook County
Honorable Frank Meekins, Judge Presiding

JUDGES:
JUSTICE GORDON DELIVERED THE OPINION OF THE COURT: McNULTY and HOURIHANE, JJ., concur.

OPINION

The defendant, Gregory Pecor, a white male, was convicted by a jury of murder, armed robbery and residential burglary and was sentenced to natural life imprisonment without parole for murder, thirty years' imprisonment for armed robbery and fifteen years imprisonment for residential burglary. He appealed his conviction and sentence raising several contentions of error. One error alleged to have occurred was the State's improper use of its peremptory challenges to exclude black venirepersons from the petit jury. Based upon that contention, this court reversed and remanded the case to the trial court for a Batson hearing (see *Batson v. Kentucky*, 476 U.S. 79 (1986)) and reserved ruling as to all other claims of error. *People v. Pecor*, 213 Ill. App. 3d 472, 572 N.E.2d 1064, 157 Ill. Dec. 600 (1991), *aff'd*, *People v. Pecor*, 153 Ill. 2d 109, 606 N.E.2d 1127, 180 Ill. Dec. 50 (1992). On remand, at the conclusion of the *Batson* hearing, the trial court found that the State provided race-neutral explanations for its exclusion of six black venirepersons and that no *Batson* violation had occurred. The defendant now appeals from that finding as to five of the six exclusions.[1]

I. *Batson* Facts & Issue

In *Batson v. Kentucky*, the United States Supreme Court held that prosecutors who excluded potential jurors on the basis of their race violated the Fourteenth Amendment's

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[1] The defendant apparently has abandoned any error with respect to the exclusion of one venireperson, Alice Jackson, since the defendant makes no argument with respect to that exclusion in his brief.

guarantee of equal protection. In a subsequent case, that court held that the defendant need not be of the same race as the excluded jurors in order to have standing to raise that constitutional violation. *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). In order to prevail on a *Batson* claim, the defendant must first establish a prima facie case of purposeful discrimination by showing facts or circumstances that raise an inference that the prosecutor used his peremptory challenges to remove members of a cognizable racial group from the venire. The burden then shifts to the prosecutor to articulate a race-neutral explanation for excluding the venire member in question. Then, the trial court must determine whether the defendant has met his burden of proving purposeful discrimination. *Batson*, 476 U.S. at 97-98, 106 S. Ct. at 1723-24. See also *Hernandez v. New York*, 500 U.S. 352, 111 S. Ct. 1859, 114 L. Ed. 2d 395 (1991) (plurality opinion); *People v. McDonald*, 125 Ill. 2d 182, 530 N.E.2d 1351, 125 Ill. Dec. 781 (1988); *People v. Randall*, 283 Ill. App. 3d 1019, 671 N.E.2d 60, 219 Ill. Dec. 395 (1996).

At the second step of the *Batson* process, after the burden has shifted to the State to establish race-neutral reasons for the exclusion, the prosecutor must give clear and reasonably specific, legitimate, race-neutral reasons. *Randall*, 283 Ill. App. 3d at 1025. Those reasons, which are subjective (*People v. Jones*, 201 Ill. App. 3d 440, 559 N.E.2d 112, 147 Ill. Dec. 112 (1990)), need not rise to the level that justify challenges for cause (*People v. Mack*, 128 Ill. 2d 231, 538 N.E.2d 1107, 131 Ill. Dec. 551 (1989)) but must demonstrate neutral explanations that relate to the particular case being tried. *People v. Fryer*, 247 Ill. App. 3d 1051, 618 N.E.2d 377, 187 Ill. Dec. 786 (1993). As stated in *Purkett v. Elem*, 514 U.S.

765, 115 S. Ct. 1769, 1771, 131 L. Ed. 2d 834 (1995) (per curiam), "a 'legitimate reason' is not a reason that makes sense, but a reason that does not deny equal protection." Accord *People v. Figgs*, 274 Ill. App. 3d 735, 654 N.E.2d 555, 560, 211 Ill. Dec. 93 (1995). Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral. *Hernandez*, 500 U.S. at 360, 111 S. Ct. at 1866.

Once the State has come forward with its reasons for striking the venirepersons, the trial court must assess the facial validity of the prosecutor's explanations (*Hernandez*, 500 U.S. at 360, 111 S. Ct. at 1866) and determine whether the reasons given are sufficient or whether they are pretextual. *People v. Harris*, 129 Ill. 2d 123, 544 N.E.2d 357, 135 Ill. Dec. 861 (1989); *People v. Nunn*, 273 Ill. App. 3d 519, 652 N.E.2d 1146, 210 Ill. Dec. 170 (1995). As the trial court's finding in that regard is factual and turns largely on questions of credibility, its findings are afforded great deference and will not be overturned on review unless they are found to be clearly erroneous or against the manifest weight of the evidence. *Batson*, 476 U.S. at 98 n.21, 106 S. Ct. at 1724 n.21; *Hernandez*, 500 U.S. at 364-69, 111 S. Ct. at 1868-71; *People v. Andrews*, 155 Ill. 2d 286, 293-94, 614 N.E.2d 1184, 1189, 185 Ill. Dec. 499 (1993); *Harris*, 129 Ill. 2d at 175, 544 N.E.2d at 380.

The record of the *Batson* hearing held on remand shows that the trial court was not convinced that the defendant had established a prima facie case of purposeful discrimination. In that regard the court stated:

> "in summation, this is a case in which I would feel very confident and very comfortable in finding that no prima facie case has been established by the defendant. However, in the interest of judicial economy, in the event that a reviewing court might disagree with that decision, I am going to find that a prima facie case has been established and I'm going to require the State to give its explanation for the exercise of its peremptory challenges as to the blacks in this case."[2]

As to each of the five venirepersons who were the subject of the *Batson* challenge and who are the subject of the instant appeal, the following information was acquired during the voire dire and the following reasons were given for their exclusions:[3]

(1) Chuck Edmonds

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[2] The State makes some argument that the defendant did not meet his initial burden of establishing a prima facie case of purposeful discrimination. However, in view of the fact that the trial court elicited race-neutral explanations from the prosecutor, and as will be discussed below, ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing of purposeful discrimination is moot. *Hernandez v. New York*, 500 U.S. 352, 359, 111 S. Ct. 1859, 1866, 114 L. Ed. 2d 395, 405 (1991); *People v. Mitchell*, 152 Ill. 2d 274, 604 N.E.2d 877, 178 Ill. Dec. 354 (1992).

[3] At the time of the *Batson* hearing, the individual who represented the State at the voire dire was employed as a circuit court judge. He was called to testify at the *Batson* hearing.

This venireperson was a 53-year-old ticket agent with the Chicago Transit Authority. He held that position for eight years; was single; had lived in the Chicago area for over thirty years; and had a sixteen-year-old son who sometimes resided with him. He was a veteran, having served in the army from 1951 to 1954 and belonged to the Chicago Urban League, Operation PUSH, and the American Legion. When asked by the trial judge what he did before becoming a ticket agent, Edmonds responded, "Student." When asked whether he had any "feelings or viewpoints concerning the defense of intoxicated or drugged condition in a criminal case," he replied that he did; and at the request of defense counsel, further explained that

"it's just one of the most horrendous things society has allowed to perpetrate [sic] the last 10 or 15 years is the whole thing of crime and drugs, and most of the ridiculous crimes seems to be drug or alcohol related, and me as a father with a 16-year-old child, and I live in the inner city, I see this constantly."

Edmonds further stated that he did not think his feelings would have any effect on his ability to be impartial.

At the Batson hearing, the prosecutor gave the following explanation for his challenge of Edmonds:

"Mr. Edmonds indicated that he was a student until he was 45 years of age, that he was single, he had been -- he was 53 years old, had been employed at the CTA for eight years and that he had been a member of an

[sic] Operation PUSH.

It was the 8-year employment at the age of 53 years of age and the statement that he had been a student until 45 years of age, coupled with membership of PUSH. The totality of those circumstances that the State exercised its fourth peremptory challenge."

The prosecutor further stated that instability in the community was demonstrated by the fact that Edmonds had been a "professional student at the age of 45 years old."

(2) Carlos Lavington

This venireperson was a 44-year-old supervisor for the Chicago Park District. Lavington worked for that entity for 18 years; described his job as "dealing with kids all day, gym;" and was a widower with two small children. He stated that sometime in the late 1970's he was called to testify as a defense witness in a robbery case, a fact which he stated would not affect his ability to be fair and impartial.

At the Batson hearing, the prosecutor explained that he exercised a peremptory challenge as to Lavington because "he had testified as a defense witness in a robbery trial and that he was employed working with kids."

(3) Alberta Collins

This venireperson was 50 years old; was single; was unemployed since 1972; lived in Chicago for 28 years; and was active in the Church of God and Christ. When asked what she did in her spare time, she stated that she watched television or read her bible.

At the *Batson* hearing, the prosecutor stated that he exercised a peremptory challenge as to Collins because she "was single and unemployed since 1972 and that she read the Bible." The prosecutor stated that the fact that Collins read the Bible gives "an inference that she would be against the death penalty."

(4) Joyce Joshawa

This venireperson was 49 years old; was divorced; had been unemployed for four years; and had been terminated from her last employment as a factory worker. She lived at the same address since 1973.

At the *Batson* hearing, the prosecutor stated that he exercised a peremptory challenge as to Joshawa because she "had been unemployed, terminated from employment and had been off work for four years.

(5) Mark Anthony Gossitt

This venireperson was 31 years old; was single; lived in Chicago; and had worked as a security guard for two years. Before working as a security guard, Gossitt worked as a dancer and had done so since he was nine years old. Gossitt stated that as a dancer he travelled

the United States.

> At the *Batson* hearing, the prosecutor stated that he exercised a peremptory challenge as to Gossitt because Gossitt had been a security guard for two years and prior to that time had been a dancer travelling around the United States. The prosecutor further stated that "it was the area in the field of entertainment in relation to the nature of the charge and the anticipated defense of drug intoxication that caused the prosecution concern regarding that individual."

At the conclusion of the *Batson* hearing, the prosecutor tendered his notes. The trial judge examined those notes, which it found to be "incredibly thorough" and totally corroborative of the *Batson* testimony. After hearing argument by both sides, the trial court concluded that the prosecutor had given valid and legitimate race-neutral reasons that were non-pretextual. The court specifically stated that in reaching that conclusion, it relied upon its knowledge of the prosecutor's "honor and good integrity."

As stated above, in order to meet its burden at the second stage of a *Batson* challenge, the State must provide race-neutral reasons for excluding the venirepersons in question. The *Batson* requirement that the proponent of a strike give a clear and specific explanation of the legitimate reason for the strike (476 U.S. at 98, 106 S. Ct. at 1723-24) is not a requirement that the reason make sense. *Purkett*, 514 U.S. at ___, 115 S. Ct. at 1769. The reason need not be persuasive or plausible; it must, however, be race neutral. *Purkett*, 514 U.S. at ___, 115 S. Ct. at 1769; *Nunn*, 273 Ill. App. 3d 519, 652 N.E.2d 1146, 210 Ill. Dec. 170. Absent an inherent

discriminatory intent in the prosecutor's explanation, the reason offered will be deemed race neutral. *Purkett*, 514 U.S. at ___, 115 S. Ct. at 1771; *Hernandez*, 500 U.S. at 360, 111 S. Ct. at 1866. See also *Randall*, 283 Ill. App. 3d at 1025-26 (for detailed list of acceptable race-neutral reasons and case citations (e.g., too old, too young, divorced, unemployed, single, lacked family contact, lacked community ties)).

In the instant case, as discussed above, the prosecutor gave several explanations for exercising its peremptory challenges as to each of the venirepersons in question. As long as one of the explanations establishes a legitimate race-neutral basis, the existence of an erroneous basis will not establish a *Batson* violation. *People v. Andrews*, 155 Ill. 2d 286, 294, 614 N.E.2d 1184, 1189, 185 Ill. Dec. 499 (1993) ("resolution of the [*Batson*] issue ***, however, requires only that we accept one of the explanations advanced by the State with respect to each venire member"); *People v. Figgs*, 274 Ill. App. 3d 735, 742, 654 N.E.2d 555, 561, 211 Ill. Dec. 93 (1995). See *People v. Mitchell*, 152 Ill. 2d 274, 302-03, 604 N.E.2d 877, 892, 178 Ill. Dec. 354 (1992) (although one basis erroneous, other legitimate basis existed to support conclusion that no *Batson* violation). See also *People v. Holmes*, 272 Ill. App. 3d 1047, 651 N.E.2d 608, 209 Ill. Dec. 430 (1995) (although race-specific trait existed, case remanded for Batson hearing for State to come forward with race-neutral reason for exclusion). Here, the following acceptable race-neutral explanations were given for each of the excluded venirepersons. Chuck Edmonds was excluded because at the age of 53 he had been employed for eight years, having been a student prior to that time. Alberta Collins was excused because she was single and unemployed since 1972; and Joyce Joshawa was excused because she had

been unemployed for four years and had been terminated from her most recent job. Employment status, unemployment and status as a student are race--neutral traits that justify a peremptory challenge. E.g., *Andrews*, 155 Ill. 2d 286, 614 N.E.2d 1184, 185 Ill. Dec. 499 (employment); *People v. Mack*, 128 Ill. 2d 231, 538 N.E.2d 1107, 131 Ill. Dec. 551 (1989) (employment); *People v. Lovelady*, 221 Ill. App. 3d 829, 582 N.E.2d 1217, 164 Ill. Dec. 273 (1991) (employment; status as student); *People v. Batchelor*, 202 Ill. App. 3d 316, 559 N.E.2d 948, 147 Ill. Dec. 608 (1990) (employment). Carlos Lavington was excused because he had testified as a defense witness in a robbery trial. Lavington's participation as a defense witness is an acceptable race-neutral reason. See *Mack*, 128 Ill. 2d 231, 538 N.E.2d 1107, 131 Ill. Dec. 551; *Lovelady*, 221 Ill. App. 3d 829, 582 N.E.2d 1217, 164 Ill. Dec. 273; *Batchelor*, 202 Ill. App. 3d 316, 559 N.E.2d 948, 147 Ill. Dec. 608 (connections with those who do defense work held to justify peremptory challenge). See also *Harris*, 129 Ill. 2d 123, 544 N.E.2d 357, 135 Ill. Dec. 861 (fact that venireperson's son testified in court as a victim of an armed robbery held to justify peremptory challenge). Mark Anthony Gossitt was excused because he had been a security guard for two years and, prior to that time, had worked in the entertainment field as a dancer. With respect to the latter experience, the prosecutor expressed concern that Gossitt would have had some exposure to drug intoxication, defendant's anticipated defense. This reason is trial related and race neutral.[4]

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[4] In *People v. Hope*, 137 Ill. 2d 430, 560 N.E.2d 849, 148 Ill. Dec. 252 (1990) the court suggested that drug counselling was material where the defense of drug intoxication was anticipated. In Hope, however, the venire member was not a drug counsellor; his

The defendant contends that the prosecutor's explanations were speculative and pretextual. With respect to Edmonds, the defendant argues that the State failed to establish that Edmonds' membership in Operation PUSH would affect his judgment; failed to question Edmonds about his student status so as to establish that he had been a student until the age of 45 or that he was unstable. As to Lavington, the defendant argues that the prosecutor did not make further inquiry into the nature of Lavington's participation as a defense witness to establish bias and failed to establish any connection between his employment "working with kids" and the trial. Next, as to Collins, the defendant argues that there is no support for the prosecutor's inference that a person who reads the Bible would be opposed to the death penalty. As to both Collins and Joshawa, the defendant argues that the prosecutor accepted other venirepersons who were single and one who was unemployed. Finally, as to Gossitt, the defendant argues that the prosecutor's belief that Gossitt would be tolerant of drug use was unsubstantiated. As a result of these deficiencies, the defendant argues that the court should have found that the

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brother was; and the prosecutor mistakenly stated that the stricken venireperson was a drug counsellor. Nevertheless, the strike was found not to be in violation of Batson. Hope was vacated and remanded by the United States Supreme Court (*Hope v. Illinois*, 501 U.S. 1202, 111 S. Ct. 2792, 115 L. Ed. 2d 966 (1990)); and on remand, the Illinois Supreme Court found that the State's reasons for the exclusion of the black venirepersons, namely, age, job status and being a crime victim, were pretextual where white venirepersons, who possessed the same characteristics without any offsetting positive traits not present in the excluded black venirepersons, were chosen to serve on the jury. *People v. Hope*, 147 Ill. 2d 315, 589 N.E.2d 503, 168 Ill. Dec. 103 (1992).

reasons given by the State were pretextual and that racial discrimination had been established.

Several of defendant's contentions concern the prosecutor's failure to make further inquiry of venirepersons Edmonds, Lavington, Collins and Gossitt to better substantiate the reasons for their exclusion. However, the prosecutor is not obligated to examine a juror to verify his assumptions and a "'prosecutor's belief does not need to be proved demonstrably true either in general or in regard to the particular [juror] excluded.'" *Figgs*, 274 Ill. App. 3d at 743, 654 N.E.2d at 562 quoting *People v. Thomas*, 201 Ill. App. 3d 255, 260, 559 N.E.2d 262, 147 Ill. Dec. 262 (1990). While the lack of further inquiry is a factor to be considered by the trial court in evaluating the legitimacy of the State's explanation, the ultimate issue is whether the prosecutor's opinion about the juror actually motivated the peremptory challenge. *Figgs*, 274 Ill. App. 3d at 743, 654 N.E.2d at 562. Here, as will be discussed below, the trial court found that the prosecutor was credible and that the race-neutral reasons he gave motivated the peremptory challenges in question.

We also reject the defendants arguments that the exclusion of Collins and Joshawa on the basis of their being single and unemployed was pretextual since nine other venirepersons selected as jurors were single and one was unemployed. The defendant has not set forth the racial composition of the venirepersons who were selected as jurors; but for the purpose of this argument, we will presume they were not black. If a prosecutor rejects a minority venireperson for possessing certain characteristics but does not reject a white venireperson who shares those same characteristics, there is no presumption that the prosecutor's explanations were

pretextual. *People v. Harris*, 129 Ill. 2d 123, 544 N.E.2d 357, 135 Ill. Dec. 861 (1989). If the white venireperson possesses an additional trait that the prosecutor seeks or if the minority venireperson possesses a trait which makes him undesirable, the explanation is not pretextual and no error obtains. E.g., *Andrews*, 155 Ill. 2d 286, 614 N.E.2d 1184, 185 Ill. Dec. 499; *Harris*; *Randall*, 283 Ill. App. 3d at 1030; *People v. Lovelady*, 221 Ill. App. 3d 829, 582 N.E.2d 1217, 164 Ill. Dec. 273 (1991). Here, as pointed out by the State, the other single venirepersons chosen were all were employed. Moreover, Collins and Joshawa were stricken not because they were single but because they were unemployed, which as discussed above is a race-neutral trait supportive of the exercise of a peremptory challenge. Similarly, the traits of the venireperson who was chosen to be a juror but who was unemployed are substantially different from Collins and Joshawa. That person, who was 61 years old, had worked for thirty years. She was married, had four adult children, and lived in the same suburban area for thirty-four years. These characteristics provide a meaningful distinction between the juror selected and Collins and Joshawa. See *Randall*, 283 Ill. App. 3d at 1030.

Only Edmonds' exclusion presents any question as to the existence of purposeful discrimination. While, as discussed above, his employment record and student status are race-neutral factors that could support the prosecutor's belief of instability,[5] the rejection of Edmonds on the basis of his

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[5] The State in its brief also suggests other race-neutral factors that would support the exercise of a peremptory challenge as to Edmonds. The State argues that Edmonds was unemployed and responsible for supporting a child while he was a student. The

membership in Operation PUSH presents the appearance that Edmonds' strike was racially motivated. In *People v. Holmes*, 272 Ill. App. 3d 1047, 651 N.E.2d 608, 209 Ill. Dec. 430 (1995), an African-American venireperson who acknowledged membership in the NAACP was struck from the jury. That venireperson possessed substantially the same characteristics as other accepted members of the venire other than race and membership in the NAACP. Several of the selected venirepersons had memberships in various civic organizations; and one selected venireperson was a member of the National Council of Jewish Women which, like the NAACP, had a strong ethnic identification and composition. Finding that the NAACP was an organization which could be "identified with race" (272 Ill. App. 3d at 1057, 651 N.E.2d at 615) and that the inference was raised that the African-American juror was excluded solely on the basis of race, the court held that the defendant had established a prima facie case of racial discrimination and remanded the matter for a Batson hearing placing the burden on the State to come forward with a race-neutral reason for the exclusion.

While there is nothing in the record specifically as to Operation PUSH, we will, for purposes of this appeal,

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defendant argues that there was nothing in the record to support that conclusion. However, as noted in the text of this opinion, the prosecutor did not state at the Batson hearing that he struck Edmonds because of this fact. The court must focus its inquiry on the reasons actually articulated by the State at the Batson hearing (*People v. Harris*, 129 Ill. 2d 123, 544 N.E.2d 357, 135 Ill. Dec. 861 (1989)); and we cannot consider other facts which could have but did not serve as the basis for the strike. See *People v. Baisten*, 203 Ill. App. 3d 64, 560 N.E.2d 1060, 148 Ill. Dec. 463 (1990).

presume that Operation PUSH is an organization whose racial composition is predominantly if not exclusively African-American; and as such we would treat any exclusion on that basis with suspicion. See *Holmes*, 272 Ill. App. 3d 1047, 651 N.E.2d 608, 209 Ill. Dec. 430; *Somerville v. State*, 792 S.W.2d 265 (Tex. App. 1990). However, unlike in Holmes, the defendant here has not shown that the other venirepersons who were selected as jurors belonged to other racially- or ethnically-focused organizations. More significantly, in the instant case, as discussed above, other independent, non-suspect, and race-neutral reasons apart from membership in Operation PUSH were given as the basis for the exclusion. The prosecutor stated that he excluded Edmonds because of his eight-year employment at the age of 53 and his statement that he had been a student prior to that employment until the age of 45. At the *Batson* hearing, the prosecutor argued that these traits suggested instability. When viewed as a whole, these independent race-neutral reasons diluted the suspicion of a race-based exclusion which may jell have been created if Edmonds' membership in Operation PUSH were the only reason given. See *Holmes*, 272 Ill. App. 3d 1047, 651 N.E.2d 608, 209 Ill. Dec. 430. See also *Andrews*, 155 Ill. 2d 286, 614 N.E.2d 1184, 185 Ill. Dec. 499.

At the third stage of the *Batson* process, the trial court must assess the credibility of the prosecutor and the "genuineness" of his or her explanation in order to determine whether the explanation provided was pretextual. *People v. Nunn*, 273 Ill. App. 3d 519, 525, 652 N.E.2d 1146, 1150, 210 Ill. Dec. 170 (1995) citing *Purkett*, 514 U.S. at ___, 115 S. Ct. at 1771-72. In this regard, we note that trial judges are familiar with local conditions and prosecutors and can consider those factors in determining credibility and

evaluating whether the State engaged in purposeful discrimination. E.g., *People v. Mahaffey*, 128 Ill. 2d 388, 539 N.E.2d 1172, 132 Ill. Dec. 366 (1989); *People v. Evans*, 125 Ill. 2d 50, 530 N.E.2d 1360, 125 Ill. Dec. 790 (1988); *Figgs*, 274 Ill. App. 3d 735, 654 N.E.2d 555, 211 Ill. Dec. 93; *People v. Boston*, 224 Ill. App. 3d 218, 586 N.E.2d 326, 166 Ill. Dec. 368 (1991). Here, at the *Batson* hearing, the prosecutor who represented the State at the voire dire testified concerning the reasons for the exercise of the peremptory challenges in question. During the course of that hearing, the trial court made several references to the character of that individual noting that he had known him for 15 years and had had ample courtroom experience with him. The judge noted that the former prosecutor was "eminently fair and reasonable"; was "a deeply religious man"; that he had "set a fine example in the area of *Batson*"; and that he was honorable and of "good integrity." The judge then summarily stated that the reasons given by the State, including instability, unemployment and bias, were legitimate and race neutral. We cannot say that that factual determination was against the manifest weight of the evidence, and we affirm the court's finding that no Batson violation occurred.[6]

II. Trial Errors

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[6] In order to comply with Supreme Court Rule 23 (159 Ill. 2d R. 23), our discussion of the trial and sentencing evidence and the arguments raised by the defendant with respect to the trial and sentencing hearing have been omitted from the published portion of this opinion. For a full discussion of that evidence and those issues, see the entire unabridged "hybrid" opinion of *People v. Pecor*, 286 Ill. App. 3d 71, 675 N.E.2d 141, 221 Ill. Dec. 234 filed with the clerk of this court.

In view of our holding that the defendant has not established a *Batson* violation and thus is not entitled to a new trial on that basis, we must address the other alleged errors reserved in our earlier opinion. *Pecor,* 213 Ill.App.3d 472, 157 Ill.Dec. 600, 572 N.E.2d 1064. The issues raised with respect to those alleged errors are: (1) whether the defendant was deprived of a fair trial where his counsel waited until the sentencing phase to apprise the jury of psychological evidence regarding cocaine usage and "conscious control;" (2) whether the trial court erred by giving the standard Illinois Pattern Jury instruction on intoxication; (3) whether the trial court erroneously refused to instruct the jury on the lesser included offenses of voluntary manslaughter and involuntary manslaughter; (4) whether the trial court refused to inform the jury of the statutory definitions of "knowingly" and "intentionally;" and (5) whether the sentence of natural life in prison was excessive.

A. Trial Evidence

At trial, the defendant did not dispute the fact that he killed the victim, Carol Holwell, on Friday, February 14, 1986. He contended, however, that he did not possess the requisite mental state to commit the offense of murder due to a long-time addiction to alcohol and cocaine and his ingestion of cocaine on the day of the murder.

The evidence at trial showed that the defendant had previously lived with Steve Otten, a drug dealer who supplied the defendant with cocaine, and Otten's live-in girlfriend, Carol Holwell, the victim. After the defendant moved out of Otten's house, he continued to purchase cocaine from Otten;

and the relations between the three were amicable. Testimony by Merrionette Park Police Officer James O'Connell and Assistant State's Attorney Matthew Carmody showed that during questioning at the police station the defendant admitted that he stabbed the victim after entering Otten's home and being surprised by her presence. The defendant told them that after he thought Holwell was dead, he attempted to open a safe in Otten's house. As he was removing its contents, he heard a noise, ran and saw the victim going out the side door. The defendant stated that he dragged her back into the house, grabbed the knife again, took her down the hallway, jumped on top of her, "started cutting her again," and killed her. He then returned to the safe from which he took a .45 caliber automatic pistol, some cocaine and $1,900. Those items, which were recovered from the defendant's home, pursuant to the defendant's instructions to the police, were introduced into evidence. Other physical evidence and exhibits which connected the defendant to Holwell's killing, not here relevant, were introduced by the State.

The defendant, who was 32 at the time of the killing, testified that he began using drugs when he was a freshman in high school. At that time, he used marijuana and alcohol and experimented with LSD, mostly on weekends. While in the army, he used cocaine and barbiturates and regularly injected heroin into his veins. He continued to use drugs and alcohol on a daily basis after he left that service in 1973. The defendant stated his drug and alcohol usage on a daily basis continued during the 1970's; that in 1981, he enrolled in and successfully completed an inpatient alcohol abuse program at Hines Veterans Hospital; and that he abstained from alcohol and drugs for about six months. The defendant stated that from the summer of 1983 until the summer of 1984, he lived

with Steve Otten, a boyhood friend. Carol moved in sometime in January 1984. During that time the defendant bought cocaine from Otten and continued to do so after he moved out. The defendant said that Otten kept the cocaine and the chemicals used for processing it in a safe in the closet in his bedroom. Often gave the defendant the combination.

The defendant further testified that during late fall 1985 and early winter 1986 he was unable to find steady employment and his cocaine usage steadily escalated. He was using between one and one-half to two and one-half grams per day and began "free-basing" as well as "snorting." The defendant stated that after using cocaine he would get so "wired up that [he] would get trembles, tremors and * * * would shake." To counter that reaction, he would drink alcohol.

The defendant stated that on February 14, 1986 he ingested about one-quarter to one-half gram of cocaine in the morning. In the early afternoon he went to Otten's house to drop off some money he owed for cocaine. (At that time, the defendant's consumption of cocaine had increased to two to four grams per day.) Carol was there so he gave her the money. They talked for about a half hour, the defendant had a beer and left. Sometime after 5:00 p.m., the defendant realized he did not have enough cocaine for the weekend so he went back to Otten's house. He stated that he did not expect anyone to be there and went to the back door, which was never locked, went to the safe in Otten's bedroom and opened it. On the dresser nearby was a dirty plate and small steak knife. The defendant took the knife, dipped it into the envelope containing cocaine, snorted the cocaine, got an immediate "rush" and then saw someone walk into the room.

The defendant testified that for the next several days he had no conscious memory of what transpired in the room. He stated that he did not know that he had killed Carol when he initially spoke to the police on the following Sunday and Monday. He stated that he first began having flashbacks of being at Otten's house on Tuesday when he was questioned at the police station by an officer. The defendant stated, "I was like in a movie that whenever he reminded me of something, or he would say something that it [*sic*] would recall a memory of my being over at the house on Friday afternoon." He said that he realized he killed Carol and began talking to the police about what he remembered after the assistant state's attorney told him his bloody palmprints were found on the handle of the steak knife.

On cross-examination, the defendant denied that he told any police officer or assistant state's attorney that after Holwell fell to the floor he went back to the bedroom to look for money. He also denied saying that he saw Holwell crawling away and stabbed her in the back. The defendant also testified that he used cocaine in the parking lot of the police station on Tuesday evening before he went into the station and that he left four grams of cocaine in the glove compartment of his car. He stated that he felt a rush but that he had no trouble navigating through the police station, understanding what was being said to him or responding to the questions. He admitted that he refused to sign the statement that had been prepared for him and stated that he was never asked to give a statement to a court reporter.

James Thomas O'Donnell, a defense witness and expert in the field of pharmacology and pharmacy, testified that cocaine can have an effect on a person's memory and can cause

blackouts where one does not recall what he or she did but was awake while doing it. On cross-examination, O'Donnell admitted that the effect cocaine would have on a person could not be determined without knowing the purity of the drug. On redirect, O'Donnell stated that cocaine is a mind-altering drug that can "affect a person's ability to act in a knowing fashion, knowing what he's doing." He also stated that it could alter a person's judgment and mind to the effect that the person does not know what he intentionally is doing. On recross, he stated that his knowledge of cocaine was not based on firsthand experience, experimental clinical studies or observations of cocaine use.

On rebuttal, an assistant state's attorney testified that on the Tuesday evening while the defendant was being questioned, he never presented the defendant with a typed statement to sign; the defendant originally agreed to give a court-reported statement but changed his mind; and the defendant stated that he stabbed Holwell, went to the safe to search for money, and stabbed Holwell again as she attempted to crawl away. That testimony was corroborated by one of the officers who was present in the interview room on Tuesday evening. Three officers testified concerning defendant's claim that he ingested cocaine immediately before entering the police station on Tuesday evening. One officer who was driving a police car and followed the defendant as he drove to the police station, stated that he pulled his car behind the defendant's car upon their arrival at the station. He stated that the defendant remained in his car long enough to shut off the engine and exit the car. He also testified that he was present during the execution of the search warrant of the defendant's car and that no cocaine was recovered from the glove compartment. A second officer, who observed the

defendant when he arrived at the police station, stated that he saw nothing that would indicate that the defendant had taken any kind of intoxicant. A third officer testified that he observed the defendant after he had pulled his car into the police station driveway and that the defendant stayed in his car for approximately fifteen seconds before exiting it. The State then introduced defendant's three prior robbery convictions for purposes of impeachment.

B. Sentencing Evidence

At the sentencing hearing, Doctor Gerson Kaplin, a psychiatrist, testified that he examined the defendant to determine whether he was fit to stand trial and to determine his mental status at the time of the alleged crime. During the examination, the defendant appeared coherent and rational and gave appropriate answers to the questions asked. The defendant told him that he decided to rob Otten's house since he was familiar with it, knew it was unlocked, knew the combination to the safe, expected to find drugs and money, and thought no one would be home. The defendant also told him that while he was taking the money and drugs, the victim surprised him. As he started to leave, he took a knife that was lying on the kitchen table and stabbed her several times. He stated that when the victim attempted to crawl away, he stabbed her a few more times and then went home. Kaplin further stated that the defendant told him that he was drinking that day but that he knew what he was doing. According to Kaplin, the defendant told him what happened in a clear and concise manner. On cross-examination, Kaplin stated that the defendant told him that he did not know why he stabbed the victim.

The State then called three individuals who were the victims of robberies wherein the defendant was one of the perpetrators. Two of the victims stated that the defendant sprayed mace on them and a third stated that another man with the defendant was carrying a knife. A fourth witness, Officer J. Moller of the Alsip Police Department, testified that the defendant was involved in a fourth robbery wherein the victim stated that the defendant had hit him over the head, choked him, punched him, and kicked him in the face. According to Moller, there no probable cause for the robbery charge because the victim was unconscious when the property was taken.

Also admitted into evidence was defendant's misdemeanor theft conviction in 1974 for which the defendant received one year adult probation and defendant's military records which indicated that action was taken against him for possession of marijuana and for desertion for having returned three months later from leave.

The defendant then presented the testimony of a former girlfriend, who indicated that he had treated her and her children well during the year and a half period of time that they were dating and the testimony of three Cook County Department of Corrections employees who testified concerning the defendant's behavior while he was an inmate. One, a deputy sheriff, indicated that the defendant worked for him in an entrusted area and that the defendant was honest and respectful. The other, who was in charge of special services and maintenance, indicated that the defendant had worked on his crew for about fourteen months and during that time had not presented any behavioral problems. The third, a mental health specialist, indicated the defendant was

respectful of him and the officers, had never been in any fights, had never been in any trouble, helped keep order in the dorms, was a stabilizing influence and participated in many work activities. On cross-examination, he stated that he was aware that the defendant had once stockpiled medicine on took 18 pills "to get high." Additional witnesses who testified as to the defendant's good character included a friend, who had known the defendant for twelve years and who tried to start a business with the defendant; the defendant's mother; the defendant's two brothers; and a next-door neighbor.

Doctor Jean Daley, a psychologist, testified that she conducted a psychological evaluation of the defendant over a three to four hour period of time. In connection with her evaluation, she also reviewed the psychiatric evaluation of the defendant, a Veteran's Administration hospitalization report, the psycho-pharmacologist report, some reports from the county jail, the state's attorney's interviews and police reports. In those reports, she saw depression, evidence of blackouts, feelings of disorientation, loss of self, a daze-like trance, and alcoholic and drug needs. Based upon those reports and her evaluation interviews with the defendant, Daley opined that the defendant was an alcoholic dependent person, a cocaine abuser and had suffered "from a brief reactive psychosis."

Daley described cocaine usage, the euphoric effects of the drug and its addictiveness. She stated that in the advanced stages of addiction, paranoia is common and the person loses his or her sense of reality and is unable to distinguish between what is real and what is not real. She stated that if the person is addicted and cannot obtain the drug, he or she becomes

"totally discombobulated" and is "totally destroyed and disorientated, [and is] fixated on getting more." She also stated that blackouts and psychosis are possible results of cocaine abuse. She defined psychosis as a loss of sense of reality, where the mind hallucinates and has delusions and where the person may believe that someone is out to kill or destroy him. In Doctor Daley's opinion, the defendant was addicted to cocaine and alcohol, he believed he was incapable of functioning without them, and he felt totally inadequate.

Daley defined a "reactive psychosis" as a brief psychotic break, lasting from two hours to a few weeks, after which time the person could function again. Daley stated that the psychosis is induced by extreme stress and internal environmental stress. According to Daley, the person who is in this state of agitation and anxiety projects that anxiety outward while trying to deal with what that person believes is an enemy that is "after" him or her. Daley stated that the pressure can become overwhelming such that an explosive reaction occurs. In Daley's opinion, at the time the defendant killed Carol Holwell, he was in a highly agitated state. He had to have drugs because he was going away for the weekend and did not want to be "exposed."

On cross-examination, Daley stated that she believed the defendant was disoriented and detached from reality for a couple of days before the killing and that the psychotic break occurred when he was at the safe. She stated that when she questioned the defendant she did not ask him specific questions regarding his activities that preceded the killing because she was "not interested in that." She also stated that the defendant was not in a psychotic reactive state when he left his house on the afternoon of February 14, 1986.

At the conclusion of the sentencing hearing the jury found that there were mitigating factors sufficient to preclude a death sentence.

D. Analysis of *Non.Batson* Issues

With respect to the *non Batson* trial errors, the defendant first argues that he was deprived of effective assistance of counsel where his counsel: waited until the sentencing phase to call Doctor Daley to give psychological evidence regarding cocaine usage and "conscious control."

In order to obtain a reversal and new trial on the basis of ineffective assistance of counsel, the defendant must satisfy the two-prong test set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must show that: (1) counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Accord *People v. Henderson,* 171 Ill.2d 124, 215 Ill.Dec. 147, 662 N.E.2d 1287 (1996); *People v. Albanese,* 104 Ill.2d 504, 85 Ill.Dec 441, 473 N.E.2d 1246 (1984). The benchmark for judging a claim of ineffective assistance of counsel is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result" *Strickland,* 466 U.S. at 686, 104 S.Ct. at 2064. The defendant faces a high burden in meeting the *Strickland* test *(e.g., People v. Johnson,* 128 Ill.2d 253, 131 Ill.Dec, 562, 538 N.E.2d 1118 (1989); *People v. Anderson,* 266 Ill.App.3d 947, 204 Ill.Dee. 367, 641 N.E.2d 591 (1994)) as there is a strong presumption that counsel's conduct fell within the wide

range of reasonable professional assistance *(Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065).

Generally, a decision which involves a matter of trial strategy will not support a claim of ineffective assistance of counsel. *People v. Orange,* 168 Ill.2d 138, 213 Ill.Dec. 589, 659 N.E.2d 935 (1995). As the attorney is the " 'manager' of the case," strategic and tactical decisions are within his or her exclusive province. *People v. Johnson,* 220 Ill.App.3d 550, 558, 163 Ill.Dec 167, 173, 581 N.E.2d 118, 124 (1991) (quoting *People v. Wilkersan,* 123 Ill.App.3d 527, 532, 79 Ill. Dec. 1, 6, 463 N.E.2d 139, 144 (1984). See *Jones v. Barnes,* 463 U.S. 745, 751, 103 S.Ct. 3308, 3313, 77 L.Ed.2d 987 (1983) (matters of trial strategy involve "the superior ability of trained counsel"). The decision to offer certain evidence or call particular witnesses is a matter of trial strategy. *People v. Burro,* 133 Ill.2d 226, 139 Ill.Dec. 728, 549 N.E.2d 240 (1989); *People v. Smith,* 249 Ill.App.3d 460, 189 Ill.Dec. 98, 619 N.E.2d 799 (1993); *Johnson,* 220 I1LApp.3d 550, 163 Ill.Dec 167, 581 N.E.2d 118.

In the instant case, the defendant did not deny that he killed the victim; rather, he contended that he did not possess the requisite state of mind to commit murder due to the fact that he had ingested cocaine immediately before the killing and due to his long-term alcohol and cocaine abuse. In support of that contention, defense counsel called two witnesses, the defendant and a pharmacology expert. Although Doctor Daley's testimony given during the sentencing stage of the trial was relevant to and supportive of defendant's defense theory, the decision to hold her testimony until the sentencing stage was a tactical decision made by trial counsel. While the question exists as to why defense counsel

chose that tactical maneuver, since he could have reintroduced that testimony at the sentencing hearing by way of stipulation (see *People v. Gacy,* 126 Ill.2d 117, 126, 125 Ill.Dec 770, 530 N.E.2d 1340 (1988)), we cannot say that his choice was objectively unreasonable. In view of trial counsel's overall performance, his wide latitude in making tactical decisions, and the strong presumption in favor of reasonable professional assistance, defendant has not met the first prong of the *Strickland* test. See *People v. Whitehead,* 169 Ill.2d 355, 389-90, 215 Ill.Dec. 164, 180, 662 N.E.2d 1304, 1320 (1996).

Moreover, even if we were to find that defense counsel's actions fell outside the bounds of reasonable professional conduct, we cannot say that the defendant was prejudiced by that conduct. As our supreme court recently stated in describing the prejudice component of the *Strickland* test,

> "[D]etermining the prejudice component entails more than applying an outcome-determinative test. The defendant must show that counsel's performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. [Citation.] Resolution of such claims, based only on the prejudice component, involves looking at the findings unaffected by error, accounting for the effect of error on remaining findings and answering, in the end, whether the decision would' " 'reasonably likely' "' have been different. [Citations.]" *Whitehead,* 169 Ill.2d at 381, 215 Ill.Dec. at 176, 662 N.E.2d at 1316.

Here, as discussed above, during the conviction stage of defendant's trial, in support of the intoxication defense, counsel chose to present the testimony of the defendant and a

pharmacology expert. The defendant testified concerning his long-term addictions to alcohol and cocaine and to his lack of recall after he had entered Otten's house and opened the safe. Defendant's pharmacology expert testified that cocaine usage could have an effect on a person's memory; could cause blackouts; could "affect a person's ability to act in a knowing fashion, knowing what he's doing"; and could alter a person's judgment and mind to the effect that the person does not know what he intentionally is doing.

The State, on the other hand, presented evidence that four days after the killing the defendant admitted during questioning at the Merrionette police station that he killed Holwell. According to the testimony of several police officers and assistant state's attorneys, the defendant described in detail how he entered Otten's house, was surprised by Holwell's appearance, repeatedly stabbed her on two occasions while he was in the house and opened a safe from which he took money, a revolver and cocaine. Testimony elicited by the State also showed that the defendant hid the items taken from Otten's house at his home, that he told the police officers where the items were hidden, and that the officers found the items in the identified locations. Additional evidence was introduced by the State on rebuttal to contradict defendant's testimony; and the State presented evidence of defendant's prior convictions for impeachment purposes.

Doctor Daley's testimony regarding the effects of cocaine and her opinion that the defendant had suffered a "brief reactive psychosis" and was not consciously in control at the time of the killing was not new and independent evidence but corroborative evidence. Moreover, her opinions and conclusions, which were based in part upon her reliance upon

the credibility of the defendant and the information he supplied to her, would have been weakened by the State's impeachment of the defendant. Given the strength of the State's case against the defendant, we cannot say that the jury's decision "reasonably likely" would have been different. *Whitehead,* 169 Ill.2d 365, 215 Ill.Dec. 164, 662 N.E.2d 1304.

The facts in the instant case are distinguishable from the cases cited by the defendant. In *People v. Hattery,* 109 IU.2d 449, 94 Ill.Dec. 514, 488 N.E.2d 513 (1985) defense counsel admitted defendant's guilt in opening statements, advanced no theory of defense and presented no evidence or closing argument such that there was no meaningful adversarial process. In *People v. Wright,* 111 Ill.2d 18, 94 Ill.Dec. 726, 488 N.E.2d 973 (1986), defense counsel did not present an intoxication defense. The court found that the failure to do so was not attributable to trial tactics or strategy but to counsel's misapprehension of the law. Moreover, in post-conviction proceedings, the judge stated that he would have decided the case differently had he heard evidence of defendant's substance abuse. Here, as discussed above, the defense theory of intoxication was presented, the adversarial process was meaningful, and we are not convinced that the outcome of the trial would have been different had defense counsel called Doctor Daley to testify during the conviction stage of defendant's trial.

The defendant next contends that the trial court erred by giving the standard Illinois Pattern Jury instruction on intoxication. That instruction stated that "a drugged person is criminally responsible for his conduct unless his drugged condition renders him incapable of acting knowingly or

intentionally." Illinois Pattern Jury Instructions, Criminal, No. 2425.02 (2d ed. 1981); see Ill.Rev.Stat.1986, ch. 38, par. 6-3 now at 720 ILCS 5/6-3 (West 1994). The defendant argues that this instruction improperly shifted the burden of proof as to the state of mind element of the crime from the State to him in that he was required to prove that he did not act knowingly or intentionally when he stabbed the victim.

Initially, we note that the defendant has waived any error in this regard as he failed to raise this objection at trial or in his post-trial motion.[7] *E.g., People v. Reddick,* 123 Ill.2d 184, 122 Ill.Dec. 1, 526 N.E.2d 141 (1988); *People v. Anderson,* 266 Ill.App.3d 947, 204 Ill.Dec. 367, 641 N.E.2d 591 (1994); *People v. Foster,* 262 Ill.App.3d 892, 200 Ill.Dec. 516, 635 N.E.2d 855 (1994). Moreover, even assuming no waiver, we would reject defendant's argument on its merits. That same contention was raised and rejected by this court in *People v. O'Shaughnessy,* 102 Ill. App.3d 966, 58 Ill.Dec. 383, 430 N.E.2d 325 (1981). Here, as in *O'Shaughnessy,* the intoxication instruction was taken directly from the applicable statute (Ill.Rev.Stat.1979, ch. 38, par. 6.3(a)); and the jury was instructed as to the State's burden of proof regarding defendant's mental state such that, when taken as a whole, the instructions did not tend to mislead the jury as to the burden of proof. While in *O'Shaughnessy,* the defendant was charged with and convicted of armed robbery,

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[7] At trial, the defendant objected to the intoxication instruction in that the defendant sought language regarding an "intoxicated or drugged person" rather than a "drugged person." The court denied the request finding there was no evidence that the defendant was intoxicated at the time of the killing.

the mental state for that offense as with the instant offense of murder require that the person act intentionally. These cases are distinguishable from the three cases cited by the defendant, *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.E&2d 344 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); and *Mullaney v. Wilbur,* 421 U.S. 684, 95 S.Ct. 1681, 44 L.Ed.2d 608 (1975). In those cases, the erroneous instructions created a presumption that the defendant intended the consequences of his actions and placed the burden on the defendant to rebut and prove that he lacked the requisite mental state. Here, on the other hand, the instructions did not create a presumption that the defendant possessed the requisite intent nor did they place the burden on the defendant to rebut that presumption.

The defendant next contends that the trial court erroneously refused to instruct the jury on the lesser included offenses of voluntary manslaughter and involuntary manslaughter. Whether a jury instruction should be given rests within the sound discretion of the trial judge; and the defendant has the burden of proving that there is at least some evidence to warrant the giving of a tendered instruction. *People v. Brown*, 222 Ill.App.3d 703, 165 Ill.Dec. 176, 684 N.E.2d 355 (1991). At trial, the defendant requested that the voluntary manslaughter instruction be given because there was evidence that the defendant consumed a quantity of cocaine before the killing so as to negate the mental state required for the offense of murder. With the removal of malice aforethought as an element of murder, voluntary intoxication is no longer a ground upon which the charge of murder is reducible to manslaughter. *People v. Wright,* 111 Ill.2d 18, 94 Ill.Dec. 726, 488 N.E.2d 973 (1986). The court in *Wright*

stated:

> "The definition of voluntary manslaughter in our criminal code does not contain language distinguishing it from murder in regard to the defendant's intention or mental state. Voluntary manslaughter is in relevant part defined simply as criminal homicide committed by one 'acting under a sudden and intense passion resulting from serious provocation' or acting in the mistaken belief that self-defense justified the use of deadly force. (Ill.Rev.Stat.1981, ch. 38, par. 9-2 [now at 720 ILCS 5/9-2 (West 1994)].) There cannot be a judgment of voluntary manslaughter in the absence of one of these mitigating factors." 111 Ill.2d at 28, 94 Ill.Dec. at 731, 488 N.E.2d at 978.

Accord *Brown,* 222 Ill.App.3d 703, 165 Ill.Dec. 176, 584 N.E.2d 355. Here, there was no evidence of sudden and intense passion resulting from serious provocation nor was there any evidence that the defendant was acting in self-defense at the time he killed the victim.

As to defendant's claimed error as to the court's failure to give an involuntary manslaughter instruction, we initially note that defendant has waived any error in this regard by not raising this error in his post-trial motion. *E.g., Reddick,* 123 Ill.2d 184, 122 Ill.Dec. 1, 526 N.E.2d 141; *Anderson,* 266 Ill.App.3d 947, 204 Ill.Dec. 367, 641 N.E.2d 591; *Foster,* 262 Ill.App.3d 892, 200 Ill.Dec. 516, 635 N.E.2d 855. The instructions listed in that motion dealt with voluntary not involuntary manslaughter. Moreover, even if we were to consider this error, we find that there was no evidence to support an involuntary manslaughter instruction.

Involuntary manslaughter is defined in section 9-3 of the Criminal Code as follows:

> "A person who unintentionally kills an individual without lawful justification commits involuntary manslaughter if his acts whether lawful or unlawful which cause the death are such as are likely to cause death or great bodily harm to some individual, and he performs them recklessly * * *" Ill.Rev.Stat.1985, ch. 38, par. 9-3 now at 720 ILCS 5/9-3 (West 1994).

Recklessness characterizes the offenders conduct in involuntary manslaughter. *Wright,* 111 Ill.2d 18, 94 Ill.Dec. 726, 488 N.E.2d 973; *People v. Reeves,* 228 Ill.App.3d 788, 170 Ill.Dec. 794, 593 N.E.2d 683 (1992). Although on appeal, the defendant contends that he acted recklessly in ingesting cocaine before the killing, he made no such argument at trial. Moreover, even assuming one could characterize the defendant's state of mind when he ingested the cocaine as being reckless, his state of mind with respect to his act of ingesting cocaine is not proof of his state of mind when he stabbed the victim. See *Wright*, 111 Ill.2d 18, 94 Ill. Dec. 726, 488 N.E.2d 973 (evidence of recklessness where intoxicated defendant shot daughter intending to aim gun at wall). In view of the absence of any evidence to support either of the manslaughter instructions, we find no error with the court's refusal to give them.[8]

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[8] In the context of his manslaughter instruction arguments, the defendant alternatively contends that to the extent that there was no evidence presented to support these instructions, he received ineffective assistance of counsel. However, the defendant has not

The defendant next contends that the trial court erred in refusing to inform the jury of the statutory definitions of "knowingly" and "intentionally." In general, a term which is employed in a general, nontechnical context need not be defined as long as nothing in the instruction obscures its meaning. *People v. Hicks,* 162 Ill.App.3d 707, 114 Ill.Dec. 652, 516 N.E.2d 807 (1987). The terms "knowingly" and "intentionally" have plain meanings within the jury's common knowledge such that the trial court is not required to give an instruction defining them. *E.g., People v. Masini,* 65 Ill.App.3d 1011, 22 Ill.Dec. 637, 383 N.E.2d 1 (1978), *aff'd,* 78 Ill.2d 17, 34 Ill.Dec. 302, 397 N.E.2d 1368 (1979); *People v. Montgomery,* 18 Ill.App.3d 828, 310 N.E.2d 760 (1974). In *Montgomery,* the jury was instructed on the affirmative defense of intoxication but did not receive instructions defining the terms "knowingly" and "intentionally." The court, finding that no error occurred with respect to the failure to give those instructions, stated:

> "To define the terms 'intentionally' and 'knowingly' in the context of the intoxication instruction would not have aided the jury. 'Intoxication' is a self-defining term well within the comprehension of the jury. The jury was informed that the defendant bore no criminal

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shown any evidence pertaining to the manslaughter issues that existed but which was not presented. Although the defendant summarily states that Doctor Daley's testimony in the sentencing phase would have been relevant to the issue of voluntary manslaughter, we find nothing in her testimony to suggest provocation or a mistaken belief by the defendant as to self-defense.

> responsibility if it found that defendant was intoxicated at the time of the attacks. We further believe that under these facts and circumstances the instructions in question would not have been helpful to the jury in the context of enlightening the jury more concerning the substantive elements of the crimes charged. Both terms have plain meanings within the jury's common knowledge. Citations." 18 Ill.App.3d at 834, 310 N.E.2d at 765-66.

The defendant argues that *Montgomery* has been "tacitly overruled" by *People v. Brouder,* 168 Ill.App.3d 938, 119 Ill.Dec. 632, 523 N.E.2d 100 (1988). *Brouder* held that it was reversible error for the trial court to refuse defendant's tendered instruction defining "knowingly." The *Brouder* court acknowledged the holdings in *Montgomery* and *Masini,* 65 Ill.App.3d 1011, 22 Ill.Dec. 637, 383 N.E.2d 1, but distinguished those cases on their facts. In *Brouder,* the jury, during deliberations, expressed confusion over the words "knowing resistance." Thereafter, defendant tendered an instruction defining that term but the court did not give it to the jury and provided no other direction. It was because the jury demonstrated confusion as to the meaning of "knowing resistance" that the court held it was reversible error to refuse to provide the jury with defendant's tendered instruction. Since *Brouder* distinguished its facts from *Montgomery and Masini,* wherein the juries had not expressed any confusion, it cannot be said that *Brouder* overruled *Montgomery.* Moreover, since the facts in the instant case are similar to the facts in *Montgomery* and *Masini* and are distinguishable from the facts in *Brouder,* we hold that the trial court in the case at bar did not commit reversible error in refusing defendant's instructions defining "knowingly" and "intentionally."

Defendant's final argument on appeal is that the sentence of natural life in prison was excessive. In support of this contention, the defendant argues that the crime he committed was not "calculated" or "premeditated"; he carried no weapon; he acted under an impulse and was "a strung-out cocaine addict aching for a fix"; his conduct occurred under circumstances unlikely to recur (Ill.Rev.Stat.1985, ch. 38, par. 1005-5-3.1(a)(8) now at 730 ILCS 5/5-5- 3.1(a)(8) (West 1994)); his character and attitudes indicate that he is unlikely to commit another crime (Ill.Rev.Stat.1985, ch. 38, par. 1005-5- 3.1(a)(9) now at 730 ILCS 5/5-5-3.1(a)(9) (West)); and he expressed remorse.

The trial court's determination of sentence to impose, which is within the statutory range, is entitled to great deference and will not be disturbed on review absent an abuse of discretion. *People v. Perruquet,* 68 Ill.2d 149, 11 Ill.Dec. 274, 368 N.E.2d 882 (1977); *People v. Foster,* 262 Ill.App.3d 892, 200 Ill.Dec. 516, 635 N.E.2d 855 (1994). On review it is presumed that the trial court properly considered all mitigating factors and rehabilitative potential before it; and the burden is on the defendant to affirmatively show the contrary. *People v. McClellan,* 232 Ill.App.3d 990, 175 Ill. Dec. 476, 600 N.E.2d 407 (1992).

The statute provides for a term of not less than 20 and not more than 60 years of imprisonment for the offense of murder. Ill.Rev.Stat.1985, ch. 38, par. 1005-8-1(a)(1)(a) now at 730 ILCS 5/5-8-1(a)(1)(a) (West 1994). However, the court may sentence the defendant to a term of natural life in prison where the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or if any of the aggravating factors listed in subsection

9-1(b) of the Criminal Code (Ill.Rev.Stat.1985, ch. 38, 9-1(b) now at 720 ILCS 6/9-1(b) (West 1994)) are present. Ill.Rev.Stat.1985, ch. 38, par. 1005-8-1(a)(1)(b) now at 730 ILCS 5/5-8-1(a)(1)(b) (West 1994); *People v. Nitz,* 242 Ill.App.3d 209, 183 Ill.Dec. 45, 610 N.E.2d 1289 (1993). One such aggravating factor is if the murdered individual was killed in the course of another felony, including armed robbery and burglary. Ill. Rev.Stat.1985, ch. 38, par. 9-l(b)(6)(c). Here, the trial court found that the murder was committed during the course of an armed robbery and burglary. In addition, the court noted other aggravating factors (Ill.Rev.Stat.1985, ch. 38, par. 1005-5-3.2 now at 730 ILCS 5/5.5.3.2 (West 1994)) such as the defendant's history of prior delinquency and criminal convictions (Ill.Rev.Stat.1985, ch. 38, par. 1005- 5-3.2(a)(3)) and the need to deter others from committing the same crime (Ill.Rev.Stat.1985, ch. 38, par. 1005-53.2(a)(7)). The court discussed factors in mitigation (Ill.Rev.Stat.1985, ch. 38, par. 1005-5-3.1 now at 730 ILCS 5/5-5-3.1 (West 1994)) and found none to be present. The court made reference to the mitigating fact that the defendant had been unsuccessful in his intoxication defense. Ill.Rev.Stat.1985, ch. 38, par. 1005-5-3.1(a)(4) now at 730 ILCS 5/55.3.1(a)(4) (West 1994). The court questioned, however, whether the defendant was under the influence of cocaine at the time of the murder since there was evidence that he had consumed a small amount prior thereto; since there was evidence that the defendant had built a tolerance to the drug; since the defendant testified that he acted no differently except for feeling a "rush" after cocaine ingestion; and since there was no other history of violent conduct by the defendant while he was under the influence of cocaine. Finally, the court noted defendant's exceptionally brutal and heinous behavior based upon evidence that the

victim had been stabbed 124 times and that the victim had suffered agony and pain beyond comprehension. Based upon these considerations the court sentenced the defendant to a term of natural life in prison. In view of the fact that this sentence is within the statutory dictates, and in view of the fact that the court considered all factors in aggravation and mitigation, we cannot say that the sentence is an abuse of discretion. See *Foster,* 262 Ill. App.3d 892, 200 Ill.Dec. 516, 635 N.E.2d 855; *People v. Ratzke,* 253 Ill.App.3d 1054, 192 Ill.Dec. 849, 625 N.E.2d 1004 (1993); *Nitz,* 242 Ill.App.3d 209, 183 Ill.Dec. 45, 610 N.E.2d 1289.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Affirmed.

McNULTY and HOURIHANE, JJ., concur.

APPENDIX D

Appellate Court of Illinois,
First District, Fifth Division

No. 1-88-1235

[Filed May 3, 1991]

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

GREGORY C. PECOR,
Defendant-Appellant

Appeal from the Circuit Court of Cook County
Hon. Frank W. Meekins, Judge Presiding.

JUDGES:
Presiding Justice Lorenz delivered the opinion of the court. Gordon, J., concurs. Justice Murray, specially concurring in the majority's well-reasoned opinion.

After a jury trial, the defendant, Gregory Pecor, was convicted of murder and sentenced to a term of life in prison without parole. On appeal, the defendant has raised numerous issues. In this opinion we limit our consideration

to whether the trial judge erred in ruling that the defendant, a white male, did not have standing to object to the prosecution's use of peremptory challenges excluding black venirepersons from the petit jury.

We reverse and remand with directions.

We find the following facts to be relevant to the disposition of this appeal. During the jury selection, the prosecution used four of its first five peremptory challenges to exclude black venirepersons from the petit jury. The defense counsel interposed an objection arguing that the prosecution's use of peremptory challenges was racially motivated, thereby entitling the defendant to a *Batson* hearing. (*Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712.) At the time the trial judge was asked to rule on the defense counsel's request, the guidelines for a *Batson* hearing required, in part, that the defendant be a member of a "cognizable racial group" and that the excluded juror be a member of the defendant's race. (*Batson*, 476 U.S. at 96, 90 L. Ed. 2d at 87, 106 S. Ct. at 1723.) Accordingly, the trial judge denied the defendant's request for a *Batson* hearing on the ground that the defendant did not have standing. Because the trial judge precluded defense counsel from pursuing the issue, the record does not reflect the racial composition of the venire, the race of any persons subsequently excluded from the venire, or the racial composition of the petit jury.

After his conviction, the defendant filed this appeal. In his brief, the defendant argued that the prosecution's use of peremptory challenges excluding black venirepersons from the petit jury violated his rights to an impartial jury and to equal protection of the laws under the Illinois and Federal

constitutions. Subsequently, the United States Supreme Court decided two cases which have direct bearing on these issues. Prior to oral arguments, the Court decided *Holland v. Illinois* (1990), 493 U.S. 474, 107 L. Ed. 2d 905, 110 S. Ct. 803. There, the Court held that a white criminal defendant has standing to raise an objection, under the sixth amendment (U.S. Const. amend. VI), to a prosecution's use of peremptory challenges excluding black venirepersons from a petit jury; but such an exclusion was *not* in violation of that amendment. Therefore, at the oral argument, the parties argued only the equal protection issue. After oral arguments, the Court decided *Powers v. Ohio* (1991), 499 U.S. , 113 L. Ed. 2d 411, 111 S. Ct. 1364. In the context of the *Powers* decision, we are now called upon to decide whether the defendant, a white male, has standing to raise an equal protection objection to the prosecution's use of peremptory challenges excluding black venirepersons from the petit jury. For the reasons set forth below, we hold that he does.

OPINION

In *Powers*, a white male defendant was convicted of murder, aggravated murder, and attempted aggravated murder, and was sentenced to 53 years in prison. In the jury selection prior to trial, the prosecution used peremptory challenges excluding a total of seven black venirepersons from the petit jury. The defense counsel objected and asked the trial judge to compel the prosecution to explain their reasons for the exclusions. The trial judge denied the request. The defendant appealed his conviction, contending that his own race was irrelevant to the "right to object" to the prosecution's use of peremptory challenges. (*Powers*, 499 U.S. at ___, 113 L. Ed. 2d at 420, 111 S. Ct. at 1366.) The

Ohio Appellate Court affirmed the conviction, and the Ohio Supreme Court dismissed Power's appeal. The United States Supreme Court reversed and held that "a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded juror share the same race." (*Powers*, 499 U.S. at ___, 113 L. Ed. 2d at 419, 111 S. Ct. at 1366.) The case was remanded to the Ohio trial court for a *Batson* hearing.

Because *Powers* would be dispositive of the instant appeal, we must determine whether *Powers* requires retroactive application. The United States Supreme Court has held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." (*Griffith v. Kentucky* (1987), 479 U.S. 314, 328, 93 L. Ed. 2d 649, 661, 107 S. Ct. 708, 716.) Therefore, the rule announced in *Powers* is to be applied to this appeal.

Accordingly, we hold that Gregory Pecor, a white male, had standing to object to the prosecution's use of peremptory challenges excluding black venirepersons from the petit jury. We also find that, because the prosecution used four of its first five peremptory challenges to exclude black venirepersons, the defendant has raised a "legitimate and well-founded objection[]" as propounded in *Powers* and Illinois case law. (*Powers*, 499 U.S. at ___, 113 L. Ed. 2d at 429, 111 S. Ct. at 1374; see also *People v. Drew* (1990), 201 Ill. App. 3d 271, 559 N.E.2d 40 (prosecution's use of four out of six peremptory challenges to exclude minorities from the petit jury provided basis for defendant's legitimate objection).) Therefore, while expressing no opinion about the

ultimate merits of the defendant's objection, we remand this case to the trial court for a *Batson* hearing.

We are aware that the record does not reflect the racial composition of the venire, the race of any persons subsequently excluded from the venire, or the racial composition of the petit jury and that these facts may be relevant to the establishment of a *prima facie* case by the defendant. We also observe, however, that neither the trial judge, the prosecution, nor the defendant could have predicted the new procedure mandated by the United States Supreme Court in *Powers*. Upon remand, therefore, we direct the trial judge to allow the defendant an opportunity to present evidence to establish a *prima facie* case under *Batson* rather than require the defendant to rely entirely upon the current record. *People v. Allen* (1988), 168 Ill. App. 3d 397, 521 N.E.2d 1172.

Finally, this court retains jurisdiction over this case to review the trial court's ruling after the *Batson* hearing, and, if necessary, to address the other issues raised by the defendant in this appeal. *Allen*, 168 Ill. App. 3d 397, 521 N.E.2d 1172.

Reversed and remanded with directions.

CONCUR

JUSTICE MURRAY, specially concurring in the majority's well-reasoned opinion:

This case and other cases following *Batson v. Kentucky* (1986), 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712,

present a forceful argument for eliminating peremptory challenges in criminal and civil cases based on judicial economy. A return to the common law would save the taxpayers millions in relitigation expenses.

At the common law the sole criteria of a jury was "impartiality." The cardinal rule was that juries should stand indifferent before the law. There were two types of challenges at the common law. One was called a "principal challenge," the other a "challenge to the favor."

A principal challenge was grounded on a presumption that a prospective juror was biased because of a kinship by blood, affinity or other relationship. A godfather or blood relative to the ninth degree or business association to one of the parties would be subject to such a challenge.

A challenge "to the favor" was similar to our present challenge for cause. In the case of that type of challenge the conclusion to disqualify or not to disqualify was made by the trial judge after hearing evidence in the case as to whether the prospective juror had formed an irrevocable conclusion on the ultimate issue in the case. The evidence was taken on this subject during the "*voir dire*" prior to jury being finally selected. Lord Bacon defines such a challenge as "a juror who has delivered an opinion touching on the matter." (5 *Bacon* Abridgement 353.) A protection was built into the common law system by an appeal on the issue of whether the trial court arbitrarily overruled a challenge to the favor. *Coughlin v. People* (1893), 144 Ill. 140, 33 N.E. 1.

APPENDIX E

Excerpts from Trial Transcript
Voir Dire

please?

(Whereupon the following proceedings were had out of the presence and hearing of the prospective jurors:)

MR. O'HARA: Your Honor, in the exclusions the State has Just made, they have executed five of the challenges. The first challenge was a white gentleman who had been in the penitentiary. The last four challenges have been black jurors. We believe that it's been shown at this point by the State the pattern of racial exclusions of the four black jurors, and they have not challenged other jurors who have the same basic backgrounds and characteristics and race in this matter. Pursuant to People versus Bateson, I believe by these four challenges, there's been a prima facie showing at this point based on the characteristics of the last four challenges as compared to those who have not been challenged, that the only difference here has been a racial difference. The four blacks have been challenged in this matter in sequence have been Joyce Joshawa, a 49 year old male black --

THE COURT: Are you certain of that? Are you certain of that?

[176]

MR. O'HARA: By viewing him.

THE COURT: I put him down as white. Do you know something that I don't?

MR. O'HARA: He was a male black. He was the gentleman who was confused.

THE COURT: Carlos Lavington, Chuck Edmonds, and Alberta Collins.

MR. O'HARA: All four were black and all four were challenged by the State, and I believe there's been nothing in their background that would differentiate them other than racial characteristic.

MR. DWYER: Your Honor, may I just respond without -- Your Honor, if I would just point out for the record--

THE COURT: Well, wait a minute.

MR. DWYER: I don't believe they have made a prima facie case; however, we have excused four out of five that would appear to be black on its face. If the Court has no objection, I would like to address the reasons why.

THE COURT: Please do, but let's keep in mind at least from the Court's outward appearance, the defendant is a male Caucasian, is that accurate?

MR. O'HARA : Yes.

THE COURT: Is the victim allegedly a Caucasian?

[177]

MR. DWYER : That's correct.

THE COURT : Go ahead.

MR. DWYER : Your Honor, I would point out there is no race identification with the defendant. It's a white on white crime. I don't believe that Bateson applies, and I would ask the individuals, the record reflects, we have only excused one white juror, four blacks. The white juror, the only juror that's identifiable with the defendant. Therefore, I do not believe there is a race issue here.

THE COURT: Well, the Court, first of all, has serious, serious questions whether Bateson applies at all since the subsequent decisions have come down have in similar cases have ever refused to say Bateson applies. Here I have a Caucasian defendant, and an alleged victim who was Caucasian, and I have the State having exercised four challenges of black individuals, and there is nothing in the world that this Court in this case, if Bateson applies, which I seriously question that even smacks remotely the exclusion of those individuals for racial reasons in this case, and accordingly I find that the defense has failed to make a prima facie case under Bateson.

[178]

A Yeah, I was in school.

Q Husband is a mall clerk, one child two months old, congratulations, and you are presently renting, is that correct?

A Right.

Q How long have you lived in that vicinity, Carol?

A For about three years.

Q Have you always lived in Chicago?

A No, I've lived in Virginia for about a year and a half, and prior to that, I was here in Chicago.

Q You belong to any church groups, or social clubs, or political or professional organizations?

A Not at the moment.

Q Were you ever in the military?

A No.

THE COURT: I forgot, Mr. Stryker, were you ever in the military?

PROSPECTIVE JUROR: No, sir.

THE COURT: All right.

Q Carolyn, what do you do in your leisure time

for hobbies or activities?

A Since I Just had a baby, I take care of her, and I bowl on weekends.

[200]

Q What type of magazines or newspapers do you normally read?

A Sun Times, Tribune, Sports Magazine.

Q Would service on this jury cause you any substantial inconvenience?

A No.

Q Do you have any viewpoints concerning the defense of intoxicated or drugged condition in a criminal case?

A No.

Q Would that opinion change at all if cocaine were involved in this case?

A No.

Q Do you have any scrupples by which I mean strong feelings either by reason of conscious or religion against the death penalty?

A No.

Q If the defendant were found guilty of murder, could you consider all the possible penalties under state law including the death penalty?

A Yes.

Q If the defendant is found guilty of murder, two separate and distinct issues must be decided by you; namely, one, does the death penalty apply to the [201] facts in this case, and, two, if so, should it be applied to this particular defendant? Can you consider each of these issues separately?

A Yes.

Q Do you have any bias or prejudice against a person because he is charged with a crime?

A No.

Q Is there anything about this type of case that would prevent you from being fair and impartial?

A No.

Q Do you understand the defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proven guilty beyond a reasonable doubt by the State?

A Yes.

Q If the defendant decides not to testify in his own behalf, would you hold that against him?

A No.

Q Would you give any more or less weight to the testimony of a police officer simply because he is a police officer as opposed to an ordinary citizen?

A No.

Q If the State proves the defendant guilty beyond a reasonable doubt, would you hesitate at all in [202] returning a verdict of guilty?

A No.

Q If the State fails to prove the defendant guilty beyond a reasonable doubt, would you hesitate at all in returning a verdict of not guilty?

A No.

Q Would you follow the law as I state it to be regardless of what you personally think ~~the law should be~~?

A Yes.

Q Would you discuss this case and the evidence and the law with your fellow jurors and try to reach a verdict?

A No.

Q You won't talk to the other Jurors?

A Yes, I'm sorry.

Q Thank you.

KAREN COAMBS,

a prospective Juror herein, sworn to answer questions, was examined as follows :

QUESTIONS BY THE COURT:

Q Karen Coambs, C-o-a-m-b-s, you live in the City of Chicago, 44 years of age, single, an operationals [203] clerk for a bank?

A Yes.

Q How long have you been there?

A I was laid off from my other job, and I got this the end of April.

Q But you have been in banking for an extended period?

A Yes.

Q And you are presently renting, are those facts true?

A Yes.

Q Were you ever in the military?

A No.

Q Do you belong to any social clubs, or groups, or organizations at all?

A No.

Q What do you have in the way of spare time, hobbies, or activities?

A Okay, since '83, I have had a lot of relatives either sick, died, or accidently killed, so it seems like I am always running to the hospital or taking care of somebody or cleaning up somebody's house. I do reading and needlepoint sometimes.

Q Well, my condolences. Would service on this [204] Jury cause you any substantial inconvenience?

A The only thing, transportation wise.

Q Well, other than that, would it cause you any substantial inconvenience?

A No.

Q Do you have any feelings or viewpoints concerning the defense of intoxicated or drugged condition in a criminal case?

A No.

Q If it turned out that cocaine became involved in this case, would your opinion change at all?

A No.

Q Do you have any scrupples by which I mean strong feelings by reason of conscious or religion against the death penalty?

A No.

Q If the defendant is found guilty of murder, could you consider all of the possible penalties available under state law including the death penalty?

A I would consider it, yes.

Q And if the defendant is found guilty of murder, two separate and distinct issues must be decided by you; namely, one, does the death penalty apply to the facts in this case, and, two, if so, should it be applied [205] to this particular defendant? Can you consider each of these issues separately?

A Yes.

Q Do you have any bias or prejudice against a person because he is charged with a crime?

A No.

Q Is there anything about this type of case that would prevent you from being fair and impartial?

A No.

Q Do you understand that the defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proven guilty beyond a reasonable doubt by the State?

A Yes.

Q If the defendant decides not to testify in his own behalf, would you hold it against him?

A No.

Q Would you give any more or less weight to the testimony of a police officer than that of an ordinary citizen?

A No, sir.

Q If the State proves the defendant guilty beyond a reasonable doubt, would you hesitate at all in returning a verdict of guilty?

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Q Ruth Loveless, L-o-v-e-l-e-s-s, you live in one of the western suburbs, 43 years of age, divorced, and have one child 23 years of age, and you own your own home, are those facts true?

A Yes.

Q And how long have you been a nurse?

A Twenty-five plus.

Q Have you ever worked in the emergency room?

A I worked in intensive care nine years.

Q Trauma intensive care?

A Respiratory.

Q Now, the 23 year old, is that a son?

A Yes, sir.

Q Married or single?

A Single.

Q Is he employed?

A He is an automotive mechanic.

Q How long have you lived in that general vicinity?

A I Just bought the home four years.

Q Before that, where did you live?

A Berwyn.

Q You belong to any social clubs, or groups, or organizations at all?

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A Y.M.C .A

Q Is that for social activities or for religious purposes or what?

A Exercise.

Q What are your spare time activities or hobbies?

A Name it, I will try it.

Q I'd rather not. What kind of newspapers or magazines ?

A Almost any magazine.

Q Would service on this Jury cause you any substantial inconvenience?

A No, sir.

Q Do you have any feelings or viewpoints concerning the defense of intoxicated or drugged condition in a criminal case?

A No, sir.

Q If any evidence came out of cocaine usage by anybody, would that effect your ability at all?

A No, sir.

Q Do you have any scrupples by which I mean

strong feelings by reason of conscious or religion against the death penalty?

A No, sir.

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Q If the defendant is found guilty of murder, could you consider all of the possible penalties available under state law including the death penalty?

A Yes.

Q If the defendant is found guilty of murder, two separate and distinct issues must be decided by you; namely, one, does the death penalty apply to the facts in this case, and, two, if so, should it be applied to this particular defendant? Can you consider each of these issues separately?

A Yes, sir.

Q Do you have any bias or prejudice against a

person because he is charged with a crime?

A No, sir.

Q Is there anything about this type of case

that would prevent you from being fair and impartial?

A No, sir.

Q Do you understand the defendant is presumed innocent and does not have to offer any evidence in his own behalf, but must be proven guilty beyond a reasonable doubt by the State?

A Yes, sir.

Q If the defendant decides not to testify in his own behalf, would you hold it against him?

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A No.

Q Would you give any more or less weight to the testimony of a police officer than that of an ordinary citizen simply because he is a police officer?

A No, sir.

Q If the State proves the defendant guilty beyond a reasonable doubt, would you hesitate at all in returning a verdict of guilty?

A No, sir.

Q If the State fails to prove the defendant guilty beyond a reasonable doubt, would you hesitate at all in returning a verdict of not guilty?

A Please repeat that, sir.

Q If the State fails to prove the defendant guilty

beyond a reasonable doubt, would you hesitate at all in returning a verdict of not guilty?

A No, sir.

Q Would you follow the law as I state it to be regardless of what you personally think the law should be?

A Yes, sir.

NATALIE FANELEE,

a prospective Juror herein, sworn to answer questions, was examined as follows:

[215]

QUESTIONS BY THE COURT:

Q Natalie Fanelee, F-a-n-e-l-e-e, you live in one of the southern suburbs, 45 years of age, divorced, a floor clerk, is that a stockbrokerage firm?

A Yes.

Q How long have you been doing that?
A I Just got into it last September.

Q What were you doing before that?

A I worked for a Postal Service. Before that I was working at preschool as a teacher.

Q You have three children ranging in ages from 19 to 24, and you own your own home, are those facts true?

A Yes, sir.

Q How long have you lived in that general vicinity?

A Twenty-two years.

Q Tell us something about each of the children if you will, please?

A Well, my eldest works for a company in Countryside, and it closed down and moved out to Mexico. He is now working in a warehouse. He owns his own condo in Woodridge, and he is getting married July 9 of this year.

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My middle son is going to school. He attended the Medical Career Institute for one year, University of Illinois for one year, and now he is attending Morraine Valley.

Q Do you belong to any social or political or professional group?

A I did, but not at this time.

Q What type of group did you used to belong to?

A I used to belong to the Alsip Political Party.

Q Local party?

A Yes, PWP, and one of my kids was in a league.

Q What type of newspapers or publications do you read?

A Surburban Economist, Sun Times, Tribune.

Q Were you ever in the military?

A No.

Q Would service on this jury cause you any substantial inconvenience?

A No.

Q Do you have any feelings or viewpoints concerning the defense of intoxicated or drugged condition in a criminal case?

A No.

Q Would your opinion change if cocaine came out [217] in this case?

A No.

Q Do you have any strong feelings by reason of religion or conscious against the death penalty?

A No.

Q If the defendant is found guilty of murder, could you consider all the penalties under state law including the death penalty?

A Yes.

Q If the defendant is found guilty of murder, two separate and distinct issues must be decided by you; namely, one, does the death penalty apply to the facts in this case, and, two, if so, should it be applied to this particular defendant? Can you consider each of these issues separately?

A Yes, sir.

Q Do you have any bias or prejudice against a person because he is charged with a crime?

A No, I don't.

Q Anything about this type of case that would prevent you from being fair and impartial?

A No.

Q Do you understand the defendant is presumed innocent and does not have to offer any evidence in his [218] own behalf, but must be proven guilty beyond a reasonable doubt by the State?

A Yes.

Q If the defendant does decides not to testify in his own behalf, would you hold it against him?

A No, I wouldn't.

Q Would you give any more or less weight to the testimony of a police officer than that of an ordinary citizen simply because he is a police officer?

A No.

Q If the State proves the defendant guilty beyond a reasonable doubt, would you hesitate at all in returning a verdict of guilty?

A No.

Q If the State fails to prove the defendant guilty beyond a reasonable doubt, would you hesitate at all in returning a verdict of not guilty?

A No.

Q Would you follow the law as I will state it to be regardless of what you personally think the law should be?

A Yes.

Q Thank you, m'am.

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Excerpts Trial Transcript Voir Dire

JOHN FOLEY,

a prospective Juror herein, sworn to answer questions, was examined as follows:

QUESTIONS BY THE COURT:

Q John Foley, F-o-l-e-y, live in the City of Chicago, 55 years of age, married, beer truck driver, wife is in sales at a florist, five children ranging from five to twenty-six, and you own your own home, are those facts true?

A Yes, sir.

Q How long have you been driving a beer truck?

A About 12 years, sir.

Q How long have you lived in that general vicinity?

A Pretty close to 30 years.

Q Starting with the oldest, if you will, if you would tell us something about each one of your children?

A My oldest daughter work at the stock exchange, and my next daughter is an RN, and my other daughter is in nursing, and my one boy goes to Northern, and one goes to Notre Dame.

Q Were you ever in the military?

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A Yes.

Q What branch?

A Army. I got out in 1955.

Q Were you in during Korea?

A Yes.

Q What was your MOS, sir?

A I was a cook, sir.

Q And where were you stationed other than overseas?

A In Glenwood.

Q Do you belong to any social clubs or church groups or organizations?

A BFW and St. Maria's Fathers Corp.

Q What type of newspapers, books, publications do you read?

A Sun Times and Sports.

Q What do you do for leisure time?

A Usually I am too tired by the time I get home at night, but during the week, I have a room in my garage I have the kids come over, and they lift weight.

Q Would service on this jury cause you any substantial inconvenience?

A No.

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APPENDIX F

STATE OF ILLINOIS)
) SS:
COUNTY OF COOK)

**IN THE CIRCUIT COURT OF COOK COUNTY,
ILLINOIS COUNTY DEPARTMENT
CRIMINAL DIVISION**

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff/Respondent,

vs.

GREGORY PECOR,

Defendant/Petitioner.

No. 86 CR 4893
Charge: Murder

REPORT OF PROCEEDINGS had at the hearing of the above-entitled cause, before the Honorable FRANK MEEKINS, one of the Judges of said District, on the 9th day of June, 1993.

APPEARANCES:

HON. JACK O'MALLEY,
State's Attorney of Cook County, by:
MR. FRANK ZELEZINSKI,
Assistant State's Attorney,
appeared for the People;

HON. RITA A. FRY,
Public Defender of Cook County, by:
MR. ROBERT LEE and
MR. STEPHEN L. RICHARDS
Assistant Public Defenders,
appeared for the Defendant.

THOMAS E. LIEF, CSR #084-000501
Official Court Reporter
10220 S. 76th Avenue
Bridgeview, IL. 60455

like that and then you couple that with the fact that you try a case at the time under the law, as I did, Holland versus Illinois, and they change the rules on it, and somehow do you ever look into one's mind and determine intents and purposes and everything else when they change the rules on you?

But in summation, this is a case in which I would feel very confident and very comfortable in finding that no prima facie case has been established by the defendant. However, in the interest of judicial economy, in the event that a reviewing court might disagree with that decision, I am going to find that a prima facie case has been established and I'm going to require the State to give its explanation for the exercise of its peremptory challenges as to the blacks in this case.

Are you prepared to do so?

MR. ZELEZINSKI: Yes, your Honor, we are. Mr. Thomas Dwyer is here.

THE COURT: All right. Let the Record reflect that Judge Thomas Dwyer, formerly Assistant State's Attorney Thomas Dwyer and, in fact, the same Thomas Dwyer who was lead counsel in this case, has now appeared before this Court.

[53]

Good afternoon, Judge Dwyer.

JUDGE DWYER: Good afternoon, Judge Meekins.

THE COURT: Judge Dwyer, I have found that, albeit

a totally innocent one on your part, but nevertheless they changed the rules on you and they changed the rules on me in this case, and I therefore have found that, although I do not believe that there is a prima facie case established in this case at all, in the interest of judicial economy in the event that a reviewing court might disagree with me, I'm going to make a finding, sir, that there was an unintentional but nevertheless prima facie basis, and at this time I'm going to ask you, sir, as the lead prosecutor in that case to give the court your explanation for the exclusion of certain jurors, if you are willing to do so, sir.

JUDGE DWYER: Yes, sir. I'll be more than happy to.

May I proceed?

THE COURT: You sure may.

JUDGE DWYER: May I use the podium?

THE COURT: Whatever you wish, sir.

JUDGE DWYER: Thank you.

Your Honor, my records reflect that [54] the State exercised the first peremptory challenge on a male white.

THE COURT: Correct.

JUDGE DWYER: Does the Court want the reason for that, sir?

THE COURT: The Court does not.

Does the defense want one?

MR. RICHARDS: No.

THE COURT: No.

JUDGE DWYER: All right. The State exercised its second peremptory challenge on an individual named Joyce Joshua. My records reflect that she was a female black. My reason for excluding that individual, that the voir dire indicated that she had been unemployed, terminated from employment and she had been off work for four years.

The State exercised the third peremptory challenge on Carlos Lavington, a male black. During the course of the voir dire Mr. Lavington indicated that he had testified as a defense witness in a robbery trial and that he was employed working with kids.

State's fourth peremptory challenge excused Mr. Edmonds, Chuck Edmonds, a male black. [55] In the course of the voir dire Mr. Edmonds indicated that he was a student until he was 45 years of age, that he was single, he had been -- he was 53 years old, had been employed at CTA for eight years and that he had been a member of an Operation PUSH.

It was the 8-year employment at the age of 53 years of age and the statement that he had been a student until 45 years of age, coupled with membership of PUSH. The totality of those circumstances that the State exercised its fourth peremptory challenge.

The fifth peremptory challenge was exercised against Albirtha Collins, a female black. Ms. Collins had indicated that she was single and unemployed since 1972 and that she read the Bible. That was the juncture, Judge Meekins, that the defense mad the motion for Batson.

Subsequent to that motion, sir, the State exercised two additional peremptory challenges regarding minorities. Would the Court wish that I present the reasons on those two?

THE COURT: Yes, I would, please.

JUDGE DWYER: All right, sir.

On the sixth peremptory challenge [56] against an individual named, I believe it is a Mr. Stryker, indicated that--

THE COURT: Excuse me. I thought Mr. Stryker was a male white.

JUDGE DWYER: All right.

THE COURT: The next one that I have, Judge, Dwyer, is Alice Jackson.

JUDGE DWYER: I show it as the next one.

THE COURT: Strike Stryker.

JUDGE DWYER: Strike Stryker. There is no necessity of reason, I will strike Stryker.

The seventh peremptory challenge was for Ms. Dorothy Showlo, S-h-o-w-l-o--

THE COURT: I reflect that as a female white. That's accurate. Next one is Alice Jackson.

JUDGE DWYER: The last was the eighth peremptory challenge on an Alice Jackson. She was a female black. It is my recollection that during the voir dire she indicated that she shared the responsibility on a small retail store or business

[57]

finding of guilty of this defendant. I look at each and every one of the choices here, Judge, and what they show, without going and enumerating each individually, Judge, is certain of these jurors, such as Joshua Joyce, employment was terminated four years ago, shows instability in the community, your Honor, not a good individual, not a citizen who's a hard-working individual as we would like to look at this matter.

Carlos Lavington, Judge, testified as a defense witness, would be quite biased, in our opinion, Judge.

Looking further along the line, your Honor, there's instability in the community regarding Charles Edmonds, who is a professional student at the age of 45 years old.

Albirtha Collins, she reads the Bible, Judge, it does give an inference that she would be against the death penalty.

Alice Jackson, she had a business, your Honor, which

indicated that she -- and indicated that it was more important to her than being a juror and that she would not be a juror to give this matter consideration, as Judge [66] Dwyer so presented to the Court, and even regarding the final juror, which was the alternate juror, he was involved in the entertainment business which there's an inference that because of his long period with that there may be some sympathy to the defense of intoxication in this matter, your Honor.

Your Honor, on the basis of all these reasons given I believe that each and every juror was excluded on racially neutral reasons and that this Court find that there was no violation of Batson.

THE COURT: Gentlemen for the defense wish to present argument?

MR. RICHARDS: Yes, your Honor.

THE COURT: Please do.

MR. RICHARDS: Just briefly, with all due respect to Judge Dwyer, we believe these reasons collectively and individually are pretextual.

Mr. Lavington testified as a defense witness and is employed working with kids. The standard, as your Honor is aware, is that the reasons must be race neutral, legitimate and trial-related. For the life of me I don't understand what employed, working with kids would have to do with [67] legitimate race neutral reasons and non-pretextual, then I have never encountered them.

I'm not going to go over in the detail that Judge Dwyer put them out in characterizing each one, dealing in the areas of instability and unemployment and bias, that have all been held by various reviewing courts to be valid and legitimate reasons. His explanation with respect to even an alternate juror certainly was race neutral to this Court. Whether one chooses to agree or disagree with his assessment is irrelevant as long as it is race neutral, and it clearly was race neutral.

So as far as the state having come forward and given race neutral reasons, I find beyond any shadow of any doubt that each and every one of the reasons given here today is, in fact, legitimate, is race neutral and is not pretextual, and accordingly I rule that no violation of Batson occurred in this case.

By the way, and I said at the beginning and I will still incorporate by reference herein as to the Andrews case, which says that a valid consideration is a trial judge's knowledge of

[71]